No. 04-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Petitioners,

v.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case, like *Smith v. City of Jackson* ("*City of Jackson*"), 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004), raises an important federal issue on which the circuit courts of appeals are significantly divided: whether the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides for a disparate impact claim. This case also raises the next important federal issue which necessarily arises, assuming that this Court holds that a disparate impact claim is cognizable under the ADEA: what are the applicable evidentiary standards governing such a claim? The third issue concerns the Second Circuit's refusal to apply current state law holding that a disparate impact claim is unavailable under state anti-discrimination laws.

1. Is a disparate impact age discrimination claim viable under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*?

2. Assuming that a disparate impact claim is available under the ADEA, what are the applicable evidentiary standards?

3. Is a federal court bound to apply state substantive law, as articulated by the state's intermediate court, which has refused to recognize state law disparate impact age discrimination claims?

LIST OF THE PARTIES TO THIS PROCEEDING

The following individuals were named as parties in the proceedings before the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit, and were included in the caption of both of these proceedings below, but they are believed to have no interest in the outcome of this petition: Henry Bielawski, Ronald G. Butler, Sr., James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, William C. Reynheer (deceased), Hildreth E. Simmons, Teofolis F. Turlais, and Bruce E. Vedder. Notice of non-interest has been served upon each of these individuals pursuant to Supreme Court Rule 12.6. All other parties in the courts below are named in the caption to this petition.

STATEMENT PURSUANT TO RULE 29.6

KAPL, Inc.'s parent corporation is Lockheed Martin Corporation, which owns 100% of KAPL Inc.'s stock. Lockheed Martin Corporation does not have a parent company. The publicly traded companies who own approximately 10% or more of Lockheed Martin Corporation's stock, as reported on Schedule 13G pursuant to Section 16(a) of the Securities Exchange Act of 1934, are:

State Street Bank and Trust Company,
acting in various fiduciary capacities
18.96%

U.S. Trust Company, National
Association, as Trustee for
Lockheed Martin Corporation
Defined Contribution Plan
18.92%

FMR Corporation
11.96%

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit was entered on August 23, 2004 and is reported at 381 F.3d 56 (2d Cir. 2004). It is reprinted in Appendix A to this petition. The opinion of the United States District Court for the Northern District of New York, decided February 13, 2002, is reported at 185 F. Supp. 2d 193 (N.D.N.Y. 2002) and is reprinted in Appendix B.

STATEMENT OF JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit") sought to be reviewed was entered on August 23, 2004.

2. The order of the Second Circuit denying petitioners' motion for rehearing or reconsideration en banc, contained in Appendix C, is dated October 15, 2004.

3. The statutory provision which confers jurisdiction on the Supreme Court to review a judgment of a circuit court of appeals on a writ of certiorari is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS

The relevant statutory provisions and regulations involved in this case and set forth verbatim in Appendix D are:

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

The New York State Human Rights Law, Executive Law § 290 *et seq.*

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

The Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv).

29 C.F.R. § 1625.7(d).

STATEMENT OF THE CASE

Basis for Jurisdiction in the First Instance

The United States District Court for the Northern District of New York ("District Court"), pursuant to 28 U.S.C. § 1331 and § 1367, exercised subject matter jurisdiction over respondents' claims that they were discriminated against in employment because of their ages in violation of the ADEA, 29 U.S.C. § 621 *et seq.*, on the basis that these claims presented a federal question.

The District Court exercised subject matter jurisdiction over respondents' claims of age discrimination in employment under the New York State Human Rights Law ("HRL"), Executive Law § 290 *et seq.*, pursuant to its supplemental jurisdiction as defined under 28 U.S.C. § 1367.

Factual Background

Petitioner KAPL, Inc. ("KAPL"), a wholly owned subsidiary of the Lockheed Martin Corporation, manages and operates the Knolls Atomic Power Laboratory ("Laboratory"), a government-owned nuclear research and development facility, pursuant to a contract between KAPL and the United States Department of Energy ("DOE"). *Meacham v. KAPL*, 381 F.3d 56, 62 (2d Cir. 2004). KAPL employees are responsible for the development of nuclear propulsion systems for submarines and surface ships in the United States Navy's nuclear fleet. They also train Navy personnel to operate those systems. *Id.* This case arises out of an involuntary reduction in force ("RIF") of Laboratory personnel implemented in 1996.

The RIF was a direct consequence of a government-imposed staffing ceiling or "manhour" limitation, established by the DOE in response to the end of the Cold War. *Id.* Petitioners attempted to meet this staffing ceiling without laying off employees involuntarily, but could not avoid a RIF. *Id.* at 62-63. To determine which salaried employees should be laid off, petitioners designed an age-neutral matrix for ranking employees based upon their comparative performance, the criticality of their skills, their flexibility or whether or not they could perform more than one job, and their years of company service. *Id.* at 63-64.

Thirty-one of the salaried employees who ranked lowest on the matrices were identified for layoff. Of this number, thirty were over the age of forty.[1] Petitioners reviewed the

1. Five non-exempt or hourly employees were also selected for the RIF based upon seniority. Three of these employees were over (Cont'd)

reasons supporting each termination and concluded that each of the low rankings was the result of legitimate, non-discriminatory reasons unrelated to the individual's age. *Id.* at 64. Accordingly, petitioners proceeded, in good faith, with the RIF. Twenty-eight of the employees terminated in the RIF filed suit under both federal and state laws prohibiting age discrimination.

Procedural Background

Respondents in this case asserted two separate theories of age discrimination in employment under both federal and state law. First, they alleged that petitioners intentionally discriminated against them because of their ages in selecting them for termination from employment during the RIF. Second, they alleged that the same actions that formed the basis of their intentional age discrimination claims also resulted in a disparate impact on employees age forty and over. *Id.* at 65-66.

This case was tried before a jury, which completely exonerated petitioners from all liability on respondents' claims of intentional age discrimination under both federal and state law. More specifically, the jury found, as to each of the original twenty-eight plaintiffs, that they failed to prove that petitioners were motivated by age in selecting them for termination in the RIF. Nevertheless, the jury found in favor of a sub-group of twenty-six of the original twenty-eight individual plaintiffs on their disparate impact claims. *Id.* at 67.

(Cont'd)
the age of forty. Two of these individuals were among the original plaintiffs. The jury found no evidence of age discrimination in their selection for the RIF, and their claims were dismissed. No appeal was taken from that dismissal. *Meacham v. KAPL, Inc.*, 185 F. Supp. 2d at 203 n.9.

Petitioners filed timely motions for judgment as a matter of law and for a new trial and remittitur with regard to the disparate impact claims. *Id.* The District Court refused to set aside that portion of the verdict which imposed liability under both federal and state law for disparate impact age discrimination. Judgment was entered on March 28, 2002.

By Notice of Appeal timely filed on April 3, 2002, pursuant to Federal Rule of Appellate Procedure 4(a)(1), petitioners appealed from the final judgment of the District Court. *Id.* at 68. The Second Circuit had appellate jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, as an appeal as of right from a final judgment of a United States district court. The Second Circuit rendered a decision on August 23, 2004 and denied a motion for reconsideration en banc on October 15, 2004.

REASONS FOR GRANTING THE PETITION

Since the principal issue in this case is identical to the issue this Court is considering in *City of Jackson*, at a minimum, this petition should be granted and the case held for disposition in light of whatever decision is ordered in *City of Jackson.* However, this case also raises an additional issue related to *City of Jackson* that is not before the Court in that case. Accordingly, the petition should be granted on its own merits to resolve an issue the lower courts will need to resolve depending on the outcome of *City of Jackson.*

I. The Circuits Are Split on Whether a Disparate Impact Claim Is Cognizable Under the ADEA

A. There is a Significant Conflict Among the Circuits

This proceeding involves a question of exceptional importance on which the circuit courts of appeals have split. Accordingly, resolution of the split is imperative. The Second Circuit's decision that the ADEA, 29 U.S.C. § 621 *et seq.*, provides for a disparate impact claim conflicts with the authoritative decisions of five other United States courts of appeals, including *City of Jackson*, 351 F.3d at 183; *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1324 (11th Cir. 2001), *cert. dismissed*, 535 U.S. 228 (2002); *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d 553, 559 n.5 (7th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 699-704 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 987 (10th Cir. 1996), *cert. denied sub nom. Doan v. Seagate Tech.*, 519 U.S. 1056 (1997).

Additionally, the Third and Sixth Circuits have expressed doubts as to the viability of a disparate impact age discrimination claim. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995).

In contrast, three circuit courts of appeals, the Second, Eighth and Ninth Circuits, have held that a disparate impact claim is viable under the ADEA. *See Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1996); *EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1992); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980). Given the number of cases that have examined the issue and the significant split in the circuits, the issue is ripe for a definitive resolution by this Court.

B. The Supreme Court Is Already Reviewing the Issue

The Supreme Court granted certiorari to review the issue of whether or not a disparate impact claim is available under the ADEA in *City of Jackson*, which was argued on November 3, 2004. Accordingly, this petition should be granted to hold it for disposition in accordance with the ultimate decision in *City of Jackson*. In addition, as will be discussed in Points II and III below, this petition also raises other related and extremely important federal issues that merit the Court's attention.

C. Reasons Why Disparate Impact Is Unavailable Are Compelling

The Second Circuit's decision that a disparate impact theory of liability is available under the ADEA should be overturned. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), this Court stated that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."

The majority of circuits which have considered whether disparate impact is available under the ADEA have relied on *Hazen Paper* and have analyzed the statutory differences between Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the ADEA. These courts have reasoned that the statutory language of the ADEA expressly authorizes employment actions that result in an age differential where the action is based on "reasonable factors other than age." 29 U.S.C. § 623(f). Applying certain well-settled canons of statutory construction, these circuit courts have reasoned that the exception contained in § 623(f)(1) precludes disparate impact liability under the ADEA. *See, e.g.*, *City of Jackson*, 351 F.3d at 189; *Mullin*, 164 F.3d at 702; *Adams*, 255 F.3d at 1325.

The legislative history of the ADEA supports the conclusion that Congress did not intend to provide for a disparate impact theory in the ADEA. In 1991, Congress amended Title VII to provide explicitly for a disparate impact claim, codified at 42 U.S.C. § 2000e-2(k). Although Congress simultaneously amended the ADEA in a myriad of respects, it did not create a corresponding disparate impact cause of action. As found by the First Circuit:

> Congress' insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA — which was undergoing revision at the same time by the same committee and in the same bill — highly significant.

Mullin, 164 F.3d at 703.

Additionally, several circuit courts have relied on the ADEA's stated purpose and history to support their conclusion that a disparate impact claim is not available under the ADEA. *See City of Jackson*, 351 F.3d at 194; *Adams*, 255 F.3d at 1325; *Ellis v. United Airlines*, 73 F.3d 999, 1008 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996).

The ADEA was enacted after the Secretary of Labor issued a report entitled "The Older American Worker: Age Discrimination in Employment (1965)," which recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly. This Report recommended that factors affecting older people, such as policies with a disparate impact, be addressed in other ways. *City of Jackson*, 351 F.3d at 194. Thus, the legislative history of the ADEA differs from the legislative history of

Title VII, the statute under which the Supreme Court first recognized a disparate impact cause of action in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

D. The Second Circuit's Decision is in Conflict with Prior Supreme Court Caselaw

The Supreme Court's treatment of similar language in the Equal Pay Act ("EPA") has effectively been ignored by the Second Circuit. Section 206(d)(1) of the EPA provides that wage discrimination on the basis of gender is prohibited, unless the wage differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). The Supreme Court interpreted Section 206(d)(1) of the EPA to preclude disparate impact claims in *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981).

Several circuits have found the Supreme Court's rationale in *Gunther* to be persuasive on the disparate impact issue under the ADEA because the ADEA, like the EPA and unlike Title VII, expressly permits employers to defend against charges of age discrimination where the employer's decision is based upon reasonable factors other than age. *Ellis*, 73 F.3d at 1008; *Mullin*, 164 F.3d at 702. Thus, when the statute is read as a unified whole, § 623(f)(1) effects a limitation on the type of claims that are available under the ADEA as a matter of law. As explained by the First Circuit, any other conclusion would be "untenable." *Mullin*, 164 F.3d at 702.

Accordingly, this Court should grant this petition to resolve the conflict among the United States circuit courts by holding, as a matter of law, that the ADEA does not provide for a claim of disparate impact age discrimination.

II. Assuming That a Disparate Impact Claim Is Available Under the ADEA, This Court Needs to Provide Guidance to the Lower Courts on the Evidentiary Standards for Resolving Such Claims

Even if this Court determines that a disparate impact claim is viable under federal law, the procedural posture of the *City of Jackson* case does not present an opportunity for the Court to decide a related, but undecided and extremely important, question: namely, what are the applicable evidentiary standards for a disparate impact age discrimination claim? This Court should settle this important question of federal law.

A. Differences in the Statutory Provisions Between the ADEA and Title VII May Require Differing Analyses

There is no definitive Supreme Court authority settling this important question of federal law. Below, the Second Circuit purported to apply the same disparate impact analysis the Supreme Court articulated in *Griggs*. As discussed above, however, the statutory language, legislative history, and purposes of the ADEA differ from Title VII in ~~some~~ important respects. Section 623(f)(1) of the ADEA provides that an employer may "take any action otherwise prohibited [in section 623] where age is a bona fide occupational qualification ['BFOQ'] reasonably necessary to the normal operation of the particular business, or where the differentiation is based upon reasonable factors other than age ['RFOA']." While Title VII contains a parallel BFOQ provision, there is no parallel provision with regard to the RFOA exception.

This Court should grant this petition to provide guidance to the lower courts on whether these statutory differences between the ADEA and Title VII warrant a different disparate impact analysis than that applied in Title VII cases. In doing so, the Court would also provide needed guidance to the Equal Employment Opportunity Commission ("EEOC"), which has issued regulations purportedly permitting employers to avoid liability only by establishing an affirmative defense that their decisions are based upon "business necessity." 29 C.F.R. § 1625.7(d).

The ADEA does not appear to impose such a requirement, and this Court should clarify whether or not the EEOC exceeded its authority in its interpretation of the statute. Moreover, having to establish such a "business necessity" affirmative defense would create an absolute nightmare for employers because reasonable decisions they make could well have an adverse age impact.

B. Quotas or Preferential Treatment May Otherwise Result

This case is an example of an untenable bind in which employers can find themselves. The ADEA tells employers that there is no violation if their actions are based upon reasonable factors other than age. However, at the very same time, employers risk liability if acting on such reasonable business factors results in an adverse impact on the protected class. Here, as the Second Circuit correctly held, petitioners unquestionably demonstrated the budgetary need to reduce KAPL's workforce while still retaining employees with skills critical to the performance of the functions involved in operating a nuclear laboratory. *Meacham*, 381 F.3d at 74.

Petitioners also demonstrated at trial that they used reasonable selection criteria for the RIF which did **not** include age. Rather, the factors used were among the very factors courts ought to encourage employers to use: (i) comparative performance among employees, (ii) the criticality of the employees' respective skills in an industry where having critical skills is essential to the safety of our entire country and our nuclear fleet, (iii) flexibility in the application of those skills in more than one area, and (iv) years of company service. *Id.* at 63-64.

To ensure fairness, KAPL engaged in several levels of review before the RIF was implemented. Each layoff selection was reviewed by a panel of senior managers called the Review Board. KAPL's in-house counsel also reviewed the ranking process. Finally, petitioner John Freeh met with all the members of his staff personally to confirm that the persons selected for layoff were not suitable matches for any open positions in the Laboratory and determined that they were not. *Id.* In other words, petitioners took many reasonable steps and precautions to ensure the selections were fair and free of any age-bias.

At that point, petitioners were faced with a choice: they could proceed with the RIF with the identified employees confident that the selections were based upon reasonable factors other than age, or they could select other employees to be laid off solely because they were under forty years of age. Because of the government's staffing limitation, however, petitioners' options did not include reducing the number of employees selected for termination as a part of the RIF.

The ADEA does not require petitioners to give employees age forty and over preferential treatment or to make termination selections based on quotas. Selecting different employees simply because they were under forty years of age poses another dilemma. Such age-based selections would violate the state HRL, which prohibits age discrimination against employees age eighteen and over.

The jury's verdict rejecting all claims of intentional age discrimination compels the conclusion that the process was applied in an age-neutral fashion and was not motivated by age. Thus, in this case, petitioners were able to prove at trial that their decisions were based upon reasonable factors other than age.

The conclusion that the four matrix criteria are reasonable factors other than age upon which to base a layoff decision is supported in the law. *See Furr v. Seagate Tech., Inc.*, 82 F.3d at 987-88; *Hardy v. GE*, 270 A.D.2d 700, 702 (N.Y. App. Div.), *appeal denied*, 95 N.Y. 2d 765 (2000).

Significantly, the Second Circuit found that the District Court's decision upholding the verdict on the grounds that the respondents had met their burden of proof during the third and final phase of the disparate impact analysis was erroneous. The Second Circuit explained that the purported alternatives upon which respondents relied at trial were alternatives to the RIF itself; they were not the type of equally effective alternative tests or selection devices required to prove a disparate impact claim. *Meacham*, 381 F.3d at 75. Nevertheless, the Second Circuit upheld the judgment, finding that petitioners could not use subjective factors like "criticality of skills" or "flexibility" in selecting employees for the RIF if such factors result in a statistical disparity.

The Court reasoned that such subjective factors could be tainted by managerial bias. *Id.*

The Second Circuit's holding is in direct conflict with this Court's decision in *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988). In *Watson*, this Court specifically held that subjective criteria could be challenged on disparate impact grounds, but stopped well short of ruling that such subjective criteria could never be used at all by the employers in making their employment decisions if a statistical disparity resulted. Instead, in *Wards Cove*, this Court cautioned that, because courts are generally less competent than employers to restructure business practices, "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989).

The Second Circuit's decision, however, completely ignored this caution and essentially held that employers cannot rely on subjective criteria if there is a statistical disparity — even if the criteria are applied without any evidence of managerial bias, which is the case here. Unless the Court grants this petition and settles this area of law, the only practical way for an employer to avoid disparate impact liability under the ADEA will be to impose quotas or give preferential treatment to older workers.

As this Court has long-recognized, Congress never intended that employers be required to treat any individual or group preferentially because of a protected characteristic or be required to establish a numerical quota system. *Watson*, 487 U.S. at 994; *Wards Cove*, 490 U.S. at 652.

In the event that this Court finds that a disparate impact claim is viable under the ADEA, this case presents the Court with a timely opportunity to articulate the applicable evidentiary standards for the trial and appellate courts. It is essential that the Court do so now because lower courts will be looking for and will need guidance following the Court's ruling in the *City of Jackson* case.

C. The Second Circuit's Decision So Far Deviates From the Usual and Accepted Practice As to Call for an Exercise of this Court's Supervisory Powers

If this Court decides that respondents' ADEA disparate impact claims must be resolved using the Title VII analysis, the Second Circuit's purported application of that disparate impact analysis so far deviates from this Court's prior holdings that this Court should grant this petition for certiorari.

In Title VII cases, this Court has stated in no uncertain terms that the Court does not think "it is appropriate to hold a defendant liable ... on the basis of less evidence than is required to prove intentional age discrimination." *Watson*, 487 U.S. at 987. Realizing that focusing on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures, like adopting quotas or giving preferential treatment to older workers, this Court established a number of safeguards against that result.

The Court has held that a plaintiff's burden goes beyond establishing that there are statistical disparities in the workforce. First, plaintiffs are required to identify a specific employment practice that is allegedly responsible for a statistically significant disparity, and are then required to

provide statistics that show that the practice in question has caused that disparity. *Watson*, 487 U.S. at 997. The employer must then demonstrate that the identified test or selection device is based upon legitimate business reasons. *Id.* In the event that the employer meets this burden of production, which KAPL did in this case, the plaintiffs must establish that other tests or selection devices would serve the employer's legitimate interests without a similar undesirable disparate impact on the protected class. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Notably, any such test or selection device must be "equally as effective" as the challenged practice in serving the employer's legitimate goals. *Watson*, 487 U.S. at 998.

The Second Circuit deviated significantly from this high standard of proof and the safeguards established by this Court. As discussed above, respondents did not produce any evidence of alternative tests or selection devices petitioners should have used in identifying employees for the RIF. This failure is fatal to respondents' disparate impact claims. In addition, respondents offered no proof at trial that any such unidentified tests or selection devices would have been "equally as effective" in serving petitioners' legitimate business goals. In fact, using other less subjective criteria may well have resulted in these very same employees, or others age forty and over, still being selected for the RIF. The jury in this case found that petitioners were **not** motivated by the ages of the respondents in selecting them for termination as a part of the RIF. Thus, the criteria actually used during the RIF process, including flexibility and criticality, could not have been impermissibly tainted by managerial bias.

If the Second Circuit's decision stands, the only practical option for an employer seeking to select employees for a reduction in workforce would be to adopt quotas. This result was squarely rejected by Congress. *Wards Cove*, 490 U.S. at 652.

III. The Second Circuit's Refusal To Apply Intermediate State Court Decisions Is in Direct Conflict With Important Decisions of this Court

This Court should also grant this petition because the Second Circuit has decided an important federal question on when and how to apply state law in a way which conflicts with relevant and important decisions of this Court.

Indeed, in ruling on respondents' state law claim, the Second Circuit completely ignored controlling and long-standing decisions of this Court. Relying on principles established in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and set forth in Section 34 of the Judiciary Act of 1789, this Court has held that a federal court **must** follow the precedent of an intermediate appellate court of the forum state in the absence of other persuasive data that the highest court of the state would decide the substantive law question differently. *See West v. AT&T*, 311 U.S. 223, 237 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-80 (1940). *Accord Hicks v. Feiock*, 485 U.S. 624, 629-30 (1988).

After the liability portion of this case was tried by the jury, the Appellate Division of the New York Supreme Court, Third Department, expressly held that a disparate impact claim is **not** cognizable under the HRL, as a matter of law.

Arendt v. GE, 305 A.D.2d 762, (N.Y. App. Div.), *appeal denied*, 100 N.Y.2d 513 (2003); *Bohlke v. GE*, 293 A.D.2d 198 (N.Y. App. Div.), *appeal denied*, 98 N.Y.2d 693 (2002); *DiMascio v. GE*, 293 A.D.2d 842 (N.Y. App. Div.), *appeal denied*, 98 N.Y.2d 693 (2002).

As reasoned by the intermediate state appellate court in *Bohlke*, the state law protects employees age eighteen and over. *Bohlke*, 293 A.D. 2d at 200. Because New York law protects all adult workers, it is impossible for an employee to have a viable claim or to prove that a neutral practice adversely affected the protected class — the theory underlying an adverse impact claim. *Id.* That the New York Court of Appeals refused to consider the *Arendt*, *Bohlke*, and *DiMascio* cases on appeal supports the conclusion that the New York law does not provide for a disparate impact claim. *West v. AT&T*, 311 U.S. at 223.

As the Supreme Court recognized in *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941), the duty of the federal court is to mirror state law as it exists at the time its decision is rendered. As explained by the Court, "any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law." The Second Circuit completely ignored these governing legal principles.

Acknowledging that the state intermediate court decisions may foreshadow the New York Court of Appeals' resolution of this issue, the Second Circuit nevertheless declined to follow the intermediate state court decisions. More specifically, the Court refused to determine whether the HRL provides for a disparate impact age discrimination claim, stating that "New York courts should resolve this issue." *Meacham*, 381 F.3d at 71.

The Second Circuit could not avoid its obligation to determine the content of New York law with regard to respondents' claim for disparate impact age discrimination merely because it believed that this particular legal argument had not been resolved by the highest court of the state. As explained by this Court, a state is not without law merely because it has not been declared by the state's highest court. *See West v. AT&T*, 311 U.S. at 236 (". . . a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

Nor could the Second Circuit avoid its obligation to determine the content of and apply state law merely because it believed that this legal argument somehow had been waived because it was not raised until the post-trial motions. *Meacham*, 381 F.3d at 71. Neither the Court of Appeals, New York's highest court, nor any intermediate appellate court had ruled on the issue as to whether or not a disparate impact claim is available under the HRL before the time of the trial in this case. In other words, the determination that the HRL does not provide for a disparate impact claim is a new development in New York law. The Second Circuit had an obligation to correct an error of law particularly since the issue is purely legal and no fact finding was required. To do otherwise would be a manifest injustice and would violate long-standing federal principles. *See Vanderbark*, 311 U.S. at 538. *See also Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 287 (2d Cir. 1998); *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 513 (2d Cir. 2002).

Here, the jury verdict imposes liability for a state law claim that the intermediate appellate courts subsequently held does not exist. The Second Circuit's refusal to apply federal principles effectively permits this judgment to stand. This petition should be granted because the Second Circuit has decided an important federal question on when and how to apply state law in a way which conflicts with relevant and important decisions of this Court.

CONCLUSION

Petitioners respectfully request that this Court grant this petition for certiorari to review the questions that would be presented on this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 23, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2003

Argued: September 10, 2003 Decided: Aug. 23, 2004

Docket Nos. 02-7378 (L); 02-7474 (XAP)

CLIFFORD B. MEACHAM, THEDRICK L. EGHMIE, and ALLEN G. SWEET, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

JAMES R. QUINN, PH.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, PAUL M. GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, WILLIAM C. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Consolidated-Plaintiffs-Appellees,

HILDRETH E. SIMMONS, JR., HENRY BIELAWSKI, RONLAD G. BUTLER, SR., JAMES S. CHAMBERS, ARTHUR J. KASZUBSKI, DAVID J. KOPMEYER, CHRISTINE A. PALMER, FRANK A. PAXTON, JANICE M. POLSINELLE, TEOFILS F. TURLAIS, and BRUCE E. VEDDER,

Consolidated-Plaintiffs-Appellees,

Appendix A

—v.—

KNOLLS ATOMIC POWER LABORATORY, a/k/a KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross-Appellees.

Appeal from a judgment, entered after a jury trial, finding defendants liable for disparate impact age dicrimination under federal and state law, finding that defendants' violation was willful, and awarding plaintiffs liquidated damages, front and back pay, damages for mental anguish, interest, and attorney's fees.

Before:

MCLAUGHLIN, JACOBS, and POOLER,
Circuit Judges.

POOLER, Circuit Judge.

Plaintiffs are all former employees of defendant Knolls Atomic Power Laboratories ("KAPL") who lost their jobs in the course of an involuntary reduction in force ("IRIF"). As all of the plaintiffs are over forty, they are protected under the Age Discrimination in Employment Act ("ADEA"). *See* 29 U.S.C. § 631(a). They sued KAPL, its president, John Freeh, and its parent company, Lockheed Martin Corporation, alleging age discrimination under both federal and state law. In particular, they claimed that KAPL designed and

implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees. The jury rejected plaintiff's intentional discrimination claim but found that a facially neutral policy had a discriminatory impact on older employees and that KAPL could have accomplished its legitimate business goals by a method that was not discriminatory in its impact. The jury also found that defendants KAPL and Lockheed Martin acted willfully.

On appeal, KAPL attacks the verdict on several grounds. First, it urges that we reexamine and reject prior holdings of this court allowing an age discrimination claimant to proceed on a disparate impact theory. KAPL also contends that New York courts do not allow a disparate impact claim. Assuming the availability of a disparate impact claim to age discrimination plaintiffs, KAPL attacks the sufficiency of the evidence to support the disparate impact verdict because (a) the same practice—the IRIF—cannot be the basis for both a disparate treatment and a disparate impact claim; (b) plaintiffs did not sufficiently specify the contested employment practice; (c) plaintiffs' statistical evidence was inadequate and a portion of it was improperly admitted; (d) plaintiffs offered no evidence of an equally effective and no more costly alternative to the IRIF procedures; and (e) there was no competent evidence of willfulness. Finally, KAPL urges that portions of the damages award must be reduced or entirely set aside.

We affirm the verdict, holding that the arguments not waived by KAPL lack merit.

Appendix A

BACKGROUND

Relevant Facts

Our description of the background for this appeal is drawn from the trial testimony and exhibits as well as stipulated facts—viewed in light of the applicable standards of review, the limited number of issues on appeal, and questions concerning KAPL's preservation of certain issues. Because the jury ruled in KAPL's favor on the disparate treatment claim and plaintiffs question this verdict only in the alternative, we do not discuss facts relevant to it. Because the standard of review for denial of judgment as a matter of law ("JMOL") requires us to credit the testimony that favors plaintiffs and does not allow us to reverse the jury's verdict based on evidence the jury could have rejected, we do not set out, except in general terms, defendants' re tation of plaintiffs' witnesses' testimony. *See Tolbert v. Que s Coll.*, 242 F.3d 58, 70 (2d Cir.2001). And, because of the waiver issues, we address at some length the arguments defendants made in their motions for summary judgment and JMOL.

KAPL manages and operates the Knolls Atomic Power Laboratory, a research and development facility owned by the United States, under a contract with the Department of Energy ("DOE"). Its work is jointly funded by DOE and the United States Navy's Nuclear Propulsion Program (collectively, "NR"), and consists of designing advanced nuclear propulsion systems, providing training to sailors to operate them, and overseeing maintenance, repair, refueling and decommissioning.

Appendix A

NR pays KAPL on a cost-plus basis for the work it performs. To control costs, NR, in consultation with KAPL, sets an annual staffing limit for the lab.[1] This limit is designed to adequately staff the work KAPL contracts to perform for NR. KAPL must stay within this ceiling.

For fiscal year 1996, NR set KAPL's staffing level at 108 jobs below the previous year's level. In addition, NR assigned KAPL new work that KAPL alleges required it to make thirty-five new hires. In combination, the staffing level reduction and the need for new hires required KAPL to eliminate 143 existing jobs. Thus, KAPL designed and implemented a Workforce Reduction Plan ("WRP") providing the following methods to both pare the existing work force and acquire employees with unmet critical skills: (1) a voluntary separation plan ("VSP") offering a $20,000 separation incentive for employees with at least twenty years of service; (2) transfers where possible to accommodate hiring needs; (3) retraining to allow existing employees to perform new skills; (4) an involuntary reduction in force;

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1. "Staffing level" is not an exact term. The agreement between NR and KAPL instead provided for a fixed number of "man-years." If the same workers remained at the same jobs for the entire year, the staffing level would be identical to the number of manyears. However, because workers do not remain at the same jobs throughout the year and because the IRIF took some time to implement, KAPL had to eliminate more employees than it would have eliminated if it had simply been required to reduce its workforce to a certain level by a certain date. We nevertheless use the more easily comprehensible terms, "staffing levels" and "number of employees" because the distinctions between those terms and "man-years" do not affect our analysis.

and (5) new hiring only when necessary for critical skills. KAPL consistently estimated that the average voluntary separation would cost it less than the average involuntary termination.

Prior to issuing the final workforce reduction plan, KAPL considered allowing all employees to participate in the VSP. KAPL's human resources manager, Donald Burek, estimated that between 200 and 250 people would have elected to participate in such a plan. According to Freeh, KAPL rejected the idea of a VSP open to all employees except those with critical skills because, after speaking with other employers who had implemented such plans, he was concerned that denying the severance payment to persons with critical skills would cause a morale problem.

KAPL warned its employees that it could disapprove a VSP application on the basis of business needs. The company, in fact, denied at least one application because the employee had skills critical to the company.

By November 16, 1995, KAPL had completed the VSP process and allowed 107 employees to participate. The company then began to implement the IRIF component of its overall plan to reduce the workforce. Before the IRIF started, Burek made several different projections concerning its impact on the workforce by age group. The estimates of the participation by workers over forty in the IRIF ranged from 70% on the high end to 30% on the low end.

Initially, managers throughout KAPL determined which sections were facing an increased workload and which skills

were excess. The particular sections, subsections, and units that would be impacted by the IRIF were determined by their staffing budgets. That is, if a section was over budget, it undertook an IRIF. If it was under budget, there was no IRIF even if workers in the section had skills that had been determined to be "excess."

Over-budget managers were instructed to select employees for the IRIF by listing "all employees in [their] group[s] on [a] matrix"; ranking them between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service. Managers were to rate performance based on an average of the two most recent performance appraisals. The tests for making a flexibility determination were whether the employee's "documented skills [could] be used in other assignments that [would] add value to current or future Lab work" and whether the employee was "retrainable for other Lab assignments." Critical skills were those skills that were critical to continuing work in the Lab as a whole. In addition, KAPL directed managers to consider whether the "individual's skill [was] a *key* technical resource for the NR program" and whether "the skill [was] readily accessible within the Lab or generally available from the external market." An employee would receive two points for service if she had between two and five years of service, four points for six to ten years of service, six points for eleven to fifteen years, eight points for sixteen to twenty years of service, and ten points for service above twenty years.

The guidelines further instructed the managers to identify for layoff the lowest ranked employees until its staffing was

reduced to the required level. The managers were then to perform an adverse impact analysis to "determine whether [their] planned actions might have a disparate impact on a protected class of employees." For minorities and females, the guidelines suggested using the EEOC's four-fifths rule to determine whether an adverse impact existed. In explaining the rule, KAPL noted that "if the selection rate for a protected group is greater than 120% of the rate for the total population a serious discrepancy exists." The instructions further provided: "A similar analysis should be performed to assure that we are not violating the Age Discrimination in Employment Act ('ADEA')."

A review board was to assess the manager's selections "to assure adher[e]nce to downsizing principles as well as minimal impact on the business and employees." Finally, KAPL's general manager, John Freeh, and its chief counsel, Richard Correa, were to review the final IRIF selections and the impact analyses.

The managers placed 245 of a total of approximately 2,063 exempt employees on the matrices and selected thirty-one for layoff. Thirty of the terminated employees were over forty.

After managers submitted the names of employees identified for layoff, KAPL performed an adverse impact analysis, but not the four-fifths analysis described in the Guidelines. Instead, Linda Geiszler, a human resources representative, compared the average age of the workforce before the IRIF with the average age of the workforce after the IRIF. Geiszler neither received instruction on how to

conduct such an analysis from senior human resources personnel nor read any books or articles on how to do it. Although the review board considered the accuracy of managers' ratings, it did not look at age discrimination issues.

Correa testified that although Freeh did not ask him to investigate why older workers were disproportionately represented in the layoffs, he did complete a legal review of the IRIF process. His paralegal checked the math on the matrices, and he spoke with human resource representatives and some, but not all, managers "to see if there was a legitimate, nondiscriminatory reason for the selections." When he did speak with managers, he questioned them only about the lowest four or five individuals on each matrix.

Although Correa was familiar with the ADEA, he explained that he did not look at who was placed on the matrices because "[w]hat was important was [that] the RIF decisions were properly made, they were legitimate decisions." At one point, Correa testified that "an impact analysis is only required for race and sex." However, he later grudgingly acknowledged that "[r]ight now" disparate impact analysis was a viable age-discrimination theory in the Second Circuit. He further claimed that there was "no way to determine whether [Geiszler's analysis was] appropriate or not, since there's no guidance on it." Correa concluded as a result of his review that the IRIF did not violate the ADEA.

Dr. Janice Madden, a qualified expert in the area of employment discrimination and an experienced statistician who testified for the plaintiffs, analyzed the impact of several aspects of the IRIF on older employees. First, she compared

the age composition of the pre-IRIF exempt work-force to the persons actually laid off. The pre-layoff exempt population consisted of approximately 40% workers under the age of forty and approximately 60% over forty. However, workers over forty constituted approximately ninety-eight percent of the laid-off workers. Madden estimated that the probability of this differential occurring by chance was approximately one in 348,000. Looking at the IRIF section by section, Madden estimated the probability that thirty employees over forty would be laid off by chance as one in 6,639. Madden also testified that younger workers were less likely to get on the matrices in the first place. Of the 245 workers on the matrices, 179 were over forty. The odds of selecting thirty workers over forty from the 245 workers on the matrices were approximately one in 1,260.

Madden also testified that the matrices with the highest percentages of workers over forty resulted in the highest percentage of layoffs. However, even assuming that the matrices were drawn up properly, the odds of thirty older workers being laid off from these matrices were approximately one in seventy-three. Each of the disparities Madden found was statistically significant. She explained that a disparity is statistically significant if "the probability that something could happen by chance is less than 5 percent" and that each of the disparate outcomes she studied had a much lower than five percent chance of occurring randomly with the closest one being less than one percent.

Madden also considered each of the four criteria on the matrix and "found ... that the years of service score had no [e]ffect. The performance score actually had very little

[e]ffect. . . . [T]he two scores that were most responsible statistically for selecting who was RIFed among those individuals on the matrices [were] criticality and flexibility." She also concluded that excess skills could not explain the age differential. Madden concluded that the procedures set up for review of the individual managers' decisions "did not offer adequate protections to keep the prejudices of managers from influencing the outcome."

Finally, Madden criticized Geiszler's analysis of adverse impact, stating that to do a proper adverse impact analysis, a statistician must compare the age composition of the pool from which the laid off employees were selected with the age composition of the group selected for layoff. Because KAPL's exempt workforce exceeded 2,000 persons, Madden testified that "you literally could go from top to bottom of 31 people picking the oldest, you know, just blatantly and you wouldn't affect the average age composition in any meaningful way."

District Court Proceedings

In January 1997, appellants filed two separate age discrimination lawsuits in the United States District Court for the Northern District of New York. These two lawsuits, which made claims under the ADEA and New York's Human Rights Law, were consolidated. Plaintiffs alleged both disparate treatment in the planning and implementation of the IRIF and disparate impact from the IRIF. Claiming that defendants' violations of the ADEA were willful, plaintiffs demanded liquidated damages pursuant to 29 U.S.C. § 626(b). They also sought damages for emotional suffering

under the Human Rights Law, front pay, back pay, and attorney's fees.

On July 7, 1999, after discovery, defendants moved for summary judgment dismissing all of plaintiffs' claims. As relevant to this appeal, they argued that the disparate impact claim should be dismissed because (1) a disparate impact claim is not cognizable under the ADEA, (2) plaintiffs failed to identify a facially neutral policy or practice; (3) plaintiffs did not establish that the design of the IRIF caused the disparate impact on older workers because plaintiffs' expert failed to perform a regression analysis to rule out other causes; and (4) plaintiffs' disparate impact claim was nothing "more than an ill-disguised disparate treatment claim" for which plaintiffs must prove discriminatory intent. To support their argument on the last point, KAPL cited *Maresco v. Evans Chemetics,* 964 F.2d 106, 115 (2d Cir.1992) for the proposition that a disparate impact claim must be dismissed where the alleged "facially neutral employment practice coalesces with the discharge which [the plaintiff] claims to have constituted disparate treatment." The district court (Lawrence E. Kahn, *Judge*) denied defendants' motion without opinion.

The parties consented to a jury trial before Magistrate Judge Homer, the liability portion of which began June 20, 2000. At the close of plaintiffs' proof, defendants moved for judgment as a matter of law. With respect to the disparate impact claim, defense counsel argued that Dr. Madden's testimony was defective because she failed to conduct a regression analysis to rule out factors other than age, including criticality, flexibility and performance. Because

Madden purportedly did not perform a regression analysis, counsel argued that plaintiffs had not shown the policy caused the disproportionate number of layoffs of older employees.[2]

Plaintiffs' counsel identified the challenged practice as both "the overall selection process of the people to be placed on the matrices and what's on the matrices, the scoring of those people" and "each element within the overall practice." Counsel also argued that the statistical disparity itself was sufficient to demonstrate causation. As alternative practices to the IRIF, plaintiffs' counsel suggested (1) opening the VSP to the entire workforce except those with critical skills and (2) a hiring freeze.

In rebuttal, defense counsel criticized plaintiffs' reliance on individual elements of the IRIF, arguing that this reliance was "in fact, a treatment case sort of masquerading as an impact case." Defense counsel also argued that plaintiffs could not rely on the IRIF as a whole because they had not proven it was incapable of separation for analysis.

Judge Homer denied defendants' motion. Before the case was submitted to the jury, defendants renewed their Rule 50(b) motion. Again, defense counsel argued that plaintiffs' case failed to the extent that they relied on the overall IRIF because plaintiffs did not show that the IRIF was incapable of separation for analysis. Counsel also argued

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2. This argument is the only claim defendants made concerning the disparate impact theory. However, they also argued with respect to pattern and practice intentional discrimination that plaintiffs failed to submit acceptable proof of an alternative practice that would have met defendants' business goals and thus shown pretext.

once more that Dr. Madden did not establish causation. Finally, counsel contended that plaintiffs had not met their burden of showing an equally effective alternative to the IRIF. Judge Homer denied the motion.

On July 26, 2000, the jury returned a verdict in defendants' favor on the disparate treatment counts. However, the jury also found that plaintiffs had "proven that a specific employment practice of the defendants . . . although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages"; that defendants failed to "articulate[ ] a business justification for selecting the plaintiffs for termination"; that plaintiffs had proven "that an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants" and that defendants acted willfully.

Prior to the beginning of the damages phase of the trial, eight of the plaintiffs settled with the defendants. The jury awarded the remaining plaintiffs damages ranging from approximately $69,000 to over $1.1 million.

After the damages phase, defendants renewed their motion for JMOL. On liability, they contested the sufficiency of the evidence on the grounds that (1) plaintiffs impermissibly relied on the overall selection process and (2) plaintiffs' expert testimony was inadequate because she did not identify the correct population or rule out factors other than age as the cause of the disproportionate number of protected employees selected for layoff. Defendants also argued that there was a legally insufficient basis for the jury's

findings that (1) defendants failed to articulate a business justification; (2) plaintiffs proved an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals; and (3) defendants acted willfully.

On damages, KAPL contended that there was no evidence to support the front pay award for seven plaintiffs or the back pay awards to ten plaintiffs. Defendants also attacked all the prospective mental anguish awards and sought reduction of awards for past suffering to between $5,000 and $30,000.

KAPL alternatively moved for a new trial pursuant to Federal Rule of Civil Procedure 59, contending that the verdict was against the weight of the evidence and that the court's admission of Madden's testimony—particularly her testimony on the regression analyses—was prejudicial error. KAPL also sought a new trial or remittitur on some of the damages issues.

In a published opinion, Judge Homer denied KAPL's motion, with the sole exception of its request for remittitur on mental anguish damages. *Meacham v. Knolls Atomic Power Lab.*, 185 F.Supp.2d 193, 245 (N.D.N.Y.2002). The judge noted preliminarily that "[a]lthough courts of appeals are divided over the viability of the disparate impact theory under the ADEA, this theory of proof remains available in the Second Circuit." *Id.* at 206. He then addressed KAPL's various claims concerning the disparate impact verdict. He held that the plaintiffs' prima facie case was sufficient, finding that (1) in this case, the entire IRIF could serve as a facially neutral employment policy because

Madden's testimony established that "no particular factor and no particular criterion caused the disparate impact on older employees", *id.* at 208; (2) either the entire exempt work force or the exempt employees actually placed on the matrices properly could have been considered by the jury as the correct population for purposes of comparison to the plaintiffs; (3) Madden's results demonstrated statistical significance, *id.* at 210-11; and (4) Madden's testimony concerning her regression analyses was properly admitted because KAPL opened the door and, in any event, it was not prejudicial, *id.* at 211-12.

Judge Homer agreed with defendants that the jury erroneously found that KAPL had not offered a legitimate business justification. *Id.* at 213. However, the "erroneous finding [did] not merit judgment as a matter of law or a new trial" because the jury also found that plaintiffs offered proof of alternative practices that would be equally effective and no more costly than the IRIF. *Id.* at 213-14. The judge also held that the jury permissibly could have found that either a hiring freeze or an extension of the VSP would have permitted KAPL to stay within its staffing budget and retain critical skills at less cost than the IRIF. *Id.* at 215.

KAPL had argued that the willfulness verdict must be set aside both because it was inconsistent with the disparate treatment verdict and because it was unsupported by the evidence. Judge Homer rejected the inconsistency challenge based on the different mens rea standards applicable to disparate treatment and willfulness. He sustained the willfulness verdict based on (1) KAPL's awareness that the ADEA prohibited employment practices that disparately

impacted older employees; (2) defendants' knowledge that implementation of the IRIF would result in a disproportionate impact on older employees and their failure to take "meaningful steps to avoid or mitigate that impact"; (3) KAPL's use of a statistical measure for disparate impact that it knew "was incapable of identifying any disparate impact on older employees"; and (4) KAPL's post-IRIF hiring of younger employees. *Id.* at 215-16.

Primarily on waiver grounds, Judge Homer rejected plaintiffs' contention that disparate impact claims are not actionable under New York's Human Rights Law. *Id.* at 216-17. Alternatively, he held that age discrimination disparate impact claims are actionable under the Human Rights Law. *Id.* at 217.

With respect to damages, the district court rejected all of KAPL's front and back pay challenges but granted relief with respect to some plaintiffs' mental anguish damages. Specifically, if the jury had awarded a plaintiff who had not offered evidence of treatment or of physical sequelae more than $125,000 for mental anguish, the court ordered a new trial unless the plaintiff agreed to accept a damages amount of $125,000. If a plaintiff who had offered proof of treatment or physical impact received more than $175,000 in emotional suffering damages, the court set a remittitur equal to that amount. *Id.* at 221-37.

KAPL filed a timely notice of appeal and plaintiffs a timely notice of cross-appeal. KAPL's principal arguments on appeal are: (1) the ADEA does not support a cause of action based on disparate impact; (2) disparate impact is not

cognizable under the Human Rights Law; (3) there is no evidence of disparate impact because (a) plaintiffs failed to isolate and identify a facially neutral employment process; (b) Madden did not demonstrate causation; (c) Madden's post-discovery regression analysis was erroneously admitted and not probative of causation; and (d) plaintiffs did not establish an equally effective and no more costly alternative to the IRIF; (4) there is no evidence of willfulness; (5) the willfulness verdict is inconsistent with the disparate treatment verdict; (6) the emotional damages awards are excessive; and (7) there was no evidence to support the front pay awards to four plaintiffs. Plaintiffs seek to maintain their cross-appeal, which rests on two asserted evidentiary errors, only if defendants prevail on the principal appeal.

DISCUSSION

I. Principles implicated in our review.

This appeal requires us to apply general principles concerning waiver, stare decisis, and sufficiency of the evidence to support a jury verdict which we will briefly describe.

Plaintiffs argue that KAPL waived several issues by failing to raise them in its motion for JMOL. "[A] party is not entitled to challenge on appeal the sufficiency of the evidence to support the jury's verdict unless it has timely moved in the district court for judgment as a matter of law on that issue." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 164 (2d Cir.1998). To be timely, the motion must be made before the jury retires so that the non-moving party has an

opportunity to remedy any defects in its proof. *Id.* The motion "must at least identify the specific element that the defendant contends is insufficiently supported." *Id.* (quoting *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir.1998)). We will reach the waived issue if to ignore it would result in manifest injustice. *Id.* We also may correct an error below despite the lack of a timely request in the district court if the issue is purely legal and no fact finding is required. *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir.2000). However, we are much less likely to consider a waived claim "involv [ing] a complex and novel issue of state law." *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 96 (2d Cir.2000).

Stare decisis, and in particular, our obligation to follow the rulings of prior panels, also plays a role in this case. We are compelled to follow a decision of an earlier panel "unless it has been called into question by an intervening Supreme Court decision or by one of this Court sitting *in banc*," *United States v. Santiago*, 268 F.3d 151, 154 (2d Cir.2001), or "unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court, or this court *in banc*." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir.2000) (per curiam).

Where we reach the merits, we review the district court's denial of JMOL de novo. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 108 (2d Cir.2001). The district court, and thus this court, can grant the motion only if after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, it finds that there was insufficient evidence to support the verdict. *Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir.2001). Neither the district court nor this court can

set aside the jury's credibility findings or find for the movant based on evidence the jury was entitled to discredit. *Id.*

II. Disparate impact under the ADEA.

KAPL contends, based on *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993) and decisions from other circuits[3] that we should disavow our own precedent holding that policies having a disparate impact on older workers are actionable under the ADEA. According to plaintiffs, this argument was waived by KAPL's failure to raise it before submission to the jury, and is barred by stare decisis. Alternatively they claim that the argument lacks merit.

At summary judgment, KAPL acknowledged that this circuit recognizes ADEA disparate impact claims, but, in light of the authority to the contrary, did not concede that an ADEA plaintiff could make a disparate impact claim. Defs.' Mem. Supp. Summ. J. at 10-11. However, in moving for judgment as a matter of law on plaintiffs' disparate impact claim, KAPL did not preserve this argument. Nor was the argument made in KAPL's trial memorandum.

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3. *See Smith v. City of Jackson, Miss.*, 351 F.3d 183, 187 (5th Cir.2003), *cert. granted,* 124 S.Ct. 1724 (2004); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir.2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 697 (1st Cir.1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1001 (10th Cir.1996); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir.1994). *But see Arnett v. California Pub. Emp. Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir.1999), *vacated on other grounds,* 528 U.S. 1111 (2000); *Smith v. City of Des Moines,* 99 F.3d 1466, 1470 (8th Cir.1996).

Appendix A

KAPL's failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver. *See, e.g., Kirsch,* 148 F.3d at 169-70. We do not believe the attempted preservation of the issue at the summary judgment stage avoids the procedural default. *Cf. Becker v. Poling Transp. Corp.,* 356 F.3d 381, 391 (2d Cir.2004) (stating that "the denial of a motion for summary judgment is moot in light of the fact the case has since been tried before a jury"). Nevertheless, the waiver rule is not an absolute one. Here, the district court considered whether a disparate impact claim was tenable under the ADEA notwithstanding KAPL's failure to raise the issue. The district court's decision allows us to proceed with review. *See Stevens v. Department of Treasury,* 500 U.S. 1, 8 (1991) (considering the merits of an issue where—despite party's failure to present it to the courts below—those courts decided it). Moreover, the waived issue is easily resolved under existing circuit precedent. Therefore, we will address it.

Stare decisis requires us to hold that the ADEA allows disparate impact claims. As defendants concede, we have repeatedly so held. *See, e.g., Smith v. Xerox Corp.,* 196 F.3d 358, 364 (2d Cir.1999); *Criley v. Delta Air Lines, Inc.,* 119 F.3d 102, 105 (2d Cir.1997) (per curiam); *Maresco,* 964 F.2d at 115. We can reject this precedent only if a Supreme Court decision or a decision from this circuit sitting en bane implicitly or explicitly overrules it. *See Santiago,* 268 F.3d at 154; *Sokolowski,* 205 F.3d at 534-35.

In *Hazen Paper,* a disparate treatment case, the Supreme Court held that an employer may lawfully discriminate based on factors closely correlated with age. 507 U.S. at 611-13.

KAPL argues that this holding and dicta in *Hazen Paper* suggest that the Supreme Court ultimately will reject ADEA disparate impact claims. While this may be so, the *Hazen Paper* Court directly stated that it had not resolved the viability of ADEA disparate impact claims.[4] 507 U.S. at 610. The Supreme Court's express statement contradicts any claim that *Hazen Paper* expressly or implicitly overruled our prior precedent. And, the Supreme Court's dicta do not outweigh prior circuit authority. *See Smith v. City of Des Moines,* 99 F.3d 1466, 1469-70 (8th Cir.1996) (following prior case law allowing an ADEA claim for disparate impact despite its conclusion that dicta in *Hazen Paper* cast doubt on its viability); *McLaughlin v. North Carolina Bd. of Elections,* 65 F.3d 1215, 1225-26 (4th Cir.1995) ("Although subsequent Supreme Court opinions might be read to cast some doubt upon the constitutionality of the election scheme [we] upheld in [a previous case] .. . we feel bound to treat [that] result . . . as controlling unless and until the Supreme Court provides a much clearer signal to the contrary."); *Bronx Household of Faith v. Community Sch. Dist. No. 10,* 127 F.3d 207, 218 (1997) (Cabranes, J., *concurring in part and dissenting in part*) ("we are not free to follow the Supreme Court's strong suggestion in what is concededly dicta"). Of course, the decisions of other circuits do not expressly or implicitly overrule our prior cases. Therefore, we reject KAPL's contention that disparate impact claims are not permissible under the ADEA.

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4. The Court is likely to resolve this issue next term. On March 29, 2004, it granted certiorari in *Smith v. City of Jackson,* 351 F.3d 183 (5th Cir.2003), which held that the disparate impact theory of recovery is not available in age discrimination cases. 124 S.Ct. 1724 (2004).

III. Disparate impact under New York's Human Rights law.

KAPL next argues that we should set aside the jury's Human Rights Law verdict, which is the sole source of plaintiffs' emotional suffering damages. In light of the state age discrimination law's coverage of anyone over the age of eighteen, N.Y. Exec. L. § 296(3-a)(a), and the law in this circuit indicating that ADEA disparate impact plaintiffs must show that a challenged policy has an impact on the entire class, *see Criley,* 119 F.3d at 105, KAPL contends that a disparate impact claim is conceptually impossible. That is, no one employment policy can discriminate against everyone over the age of eighteen. At least one of New York's four intermediate appellate courts has accepted this premise. *See Bohlke v. General Elec. Co.,* 742 N.Y.S.2d 131, 132 (App. Div. 3d Dep't 2002). However, the question has not been addressed by New York's highest court. *See Becker v. City of New York,* 671 N.Y.S.2d 88, 90 (App. Div. 1st Dep't 1998) (noting that "[n]either the United States Supreme Court nor the Court of Appeals has ruled conclusively that disparate impact, as opposed to disparate treatment, constitutes age discrimination").

KAPL concedes that it did not raise this issue until its post-verdict motion but argues that it would constitute manifest injustice to allow the state law verdict to stand. Unlike KAPL's claim that the ADEA does not extend to disparate impact claims, this argument cannot be answered by reference to our decisions. It is also not easily resolvable by construing state law or cases. We cannot easily predict whether New York's Court of Appeals would apply *Criley* to

its own statute as the federal and state statutes differ. The federal statute creates a class of older employees who are protected while the state statute prohibits discrimination on account of age against both older and younger workers. *Compare* 29 U.S.C. § 631(a) *with* N.Y. Exec. L. § 296(3-a)(a). The general principle that we construe the Human Rights law just as we do the ADEA, *see Smith,* 196 F.3d at 363 n. 1, has little application to these two quite different statutory provisions. Although *Bohlke* may foreshadow the New York Court of Appeals' resolution of this issue, New York's highest court also could find that a policy having a disparate impact on all persons between, for example, fifty and sixty was actionable even though it had no impact on employees between eighteen and twenty-eight. Because the New York courts should resolve this issue, we decline to address it in the face of KAPL's acknowledged waiver. *See Pulvers,* 210 F.3d at 96.

IV. Adequacy of the proof of disparate impact.

To prove disparate impact, plaintiffs must first identify the specific policy or policies responsible for the disparate impact. *Smith,* 196 F.3d at 367-68. They cannot rely on the company's overall decision making process for a reduction in force unless they "can show that the elements of the employer's decision-making process are not capable of separation for analysis." *Id.* An employer's subjective decision-making process is a proper subject for a disparate impact analysis. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 990 (1988).

After identifying the relevant policy, the plaintiffs must choose the correct population for statistical analysis. *Smith,* 196 F.3d at 368. In a reduction in force, this population will generally be the population subject to termination, here either KAPL's entire exempt workforce or those exempt employees actually placed on the matrices. *Id.* Plaintiffs' expert then must compare the retention rate of protected employees to that of the non-protected employees. *Id.*

If the comparison of retention rates demonstrates "a statistical disparity . . . sufficiently substantial to raise an inference of causation," defendant must "explain the business necessity of the challenged employment practice." *Id.* at 365. After the defendants meet their burden, plaintiffs may prevail only "if [they] can show that the employer's proffered explanation was merely a pretext for discrimination." *Id.* They can do this by "show[ing] that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group." *Id.*

KAPL contends that plaintiffs' proof was deficient in several respects, the first of which is identification of the policy or practice causing the IRIF. They claim that plaintiffs (1) incorrectly focused on the entire IRIF rather than particular aspects of it and (2) impermissibly named the same practice— the design of the IRIF—as the focus of both their disparate impact and disparate treatment claims.

Plaintiffs asserts that KAPL's second argument, which focuses on *Maresco,* has been waived. In *Maresco,* we said:

> Both the disparate treatment and disparate impact theories can be invoked in a given case to establish ADEA liability, since they are simply

> alternative doctrinal premises for a statutory violation. We do not believe, however, that the disparate impact theory provides any significant analytical contribution in this case.
>
> The facially neutral employment policy that Maresco invokes as the premise for disparate impact liability coalesces with the discharge which he claims to have constituted disparate treatment. Because evidence of the employer's subjective intent to discriminate must be provided to support a claim of disparate treatment, allowing the disparate impact doctrine to be invoked as Maresco proposes would simply provide a means to circumvent the subjective intent requirement in any disparate treatment case. Furthermore, the eight discharges that occurred in connection with the divisional consolidation at issue in this case are unlikely to provide an adequate basis for the sort of statistical analysis frequently employed in disparate impact cases.

964 F.2d at 115 (internal citations and quotation marks omitted). In KAPL's view, *Maresco* means that the same policy or practice can never be the focus of both a disparate impact and a disparate treatment claim. That is, an age discrimination plaintiff cannot argue alternatively that the defendants designed their policy with discriminatory intent and that, regardless of intent, the policy had a discriminatory impact. The preliminary question before us is whether KAPL sufficiently alerted the district court to its argument.

Appendix A

KAPL's motion for summary judgment relied on *Maresco* for the proposition that plaintiffs had made only a disparate treatment claim. KAPL did not explicitly argue that plaintiffs can never maintain a *73 disparate treatment and a disparate impact claim based on the same policy. *See* Defs.' Mem. Supp. Summ. J. at 18-19. However, KAPL did describe *Maresco* as "dismissing a disparate impact claim where the plaintiffs 'facially neutral practice ... coalesces with the discharge which he claims to have constituted disparate treatment.' " *Id.* at 19. (quoting *Maresco,* 964 F.2d at 115). KAPL's references to *Maresco* at trial and before the jury retired were even more oblique. In its trial memorandum of law, KAPL did not cite *Maresco* and did not claim that disparate impact and disparate treatment claims could never focus on the same policy or practice. Instead, it argued that plaintiffs' disparate impact claim was really a disparate treatment claim in disguise. In its initial Rule 50 motion, KAPL argued:

> Number two, [plaintiffs' counsel] pointed out something also that relates to the [*Smith*] case. He spoke of the individual elements that also they are complaining about, sort of the individual flexibility, criticality, as applied. This impact case, I think is, in fact, a treatment case sort of masquerading as an impact case. They are complaining about managers subjectively applying their judgments to these decisions, which certainly can allow one to, if you've got animus, to inject it into the process. But that's treatment,

> sir. That's motivation. That's not adverse impact. That's not statistics. And that's all I want to say.

Tr. at 2486.

We believe that the district court would have understood KAPL to have argued that because plaintiffs focused on individual judgments by individual managers, they did not make out a disparate impact claim. KAPL never argued clearly that one policy could not be the focus of both a disparate impact claim and a disparate treatment claim. Thus, we hold that KAPL waived its *Maresco* claim. Had KAPL made its argument clearly, even without citation to *Maresco,* we would consider the *Maresco* argument on the merits. However, whatever the outside boundaries of a party's obligation to specify its objections, at a minimum, the party must have articulated the objection so that a reasonable judge would understand it. KAPL did not meet this standard.

We decline to exercise our discretionary jurisdiction to reach the *Maresco* claim.[5]

We turn now to plaintiffs' purported failure to identify a policy other than the overall IRIF as having a disparate impact. As discussed previously, we held in *Smith* that a plaintiff cannot rely on his employer's overall decision-making process for a reduction in force unless he "can show that the elements of the employer's decision-making process

5. To reach *Maresco,* we would need to search a large and complex record to determine whether plaintiffs' disparate impact and disparate treatment claims actually do "coalesce." Defendants' failure to preserve means that we would have to do that without the benefit of the district court's insights.

are not capable of separation for analysis." 196 F.3d at 368. Plaintiff's obligation to identify a specific employment practice causing a disparate impact stems from *Watson.* In that case, four justices of the Supreme Court said:

> The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

487 U.S. at 994 (O'Connor, *Justice,* writing for herself, the Chief Justice, and Justices White and Scalia).

One year later, in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), the Court considered plaintiffs' claim that several hiring practices including nepotism, separate hiring channels, rehire preferences, and subjective decision making resulted in a racially imbalanced workforce. *Id.* The *Wards Cove* court rejected plaintiffs' global approach, requiring instead that they demonstrate that "specific elements of the [employer's] hiring process have a significantly disparate impact on nonwhites." *Id.* at 658. Thus, although subjective decision making is subject to a disparate impact analysis, it must be shown that it is the

subjective elements of the decision-making process that caused the disparate impact.

With these principles in mind, we examine in the light most favorable to plaintiffs, their statistical proof. At the outset, we note that KAPL's IRIF was broken down and analyzed by Dr. Madden as a four-step process, and that the structure of the IRIF lent itself to that analysis; plaintiffs were thus required to "isolate [ ] and identify [ ] . . . specific employment practices" allegedly responsible for the IRIF's lopsided outcome. *Watson,* 487 U.S. at 994. Plaintiffs met this burden. A reasonable juror could have viewed Dr. Madden's testimony as establishing that (1) the procedures used to select employees to be placed on the matrices selected older employees at a disproportionate rate; (2) older employees were selected from the matrices at a rate disproportionate to their numbers on the matrices; (3) of the criteria listed on the matrices, managers' judgments on flexibility and criticality had the greatest impact on the persons selected for layoff; (4) one basic flaw in the IRIF process was the degree of subjective decision making it allowed to individual managers to set flexibility and criticality scores; and (5) another was the failure to audit for that tendency. Thus, the jury could have found that the degree of subjective decision making allowed in the IRIF created the disparity.

But sustaining the jury's causation finding is insufficient to preserve the verdict against KAPL because, as the district court ruled, the lab offered a facially legitimate business justification for the IRIF and its constituent parts: "to reduce its workforce while still retaining employees with skills

critical to the performance of KAPL's functions." *Meacham,* 185 F.Supp.2d at 213.[6] Unchallenged, KAPL's justification would preclude a finding of disparate impact. However, plaintiffs prevail nonetheless if they demonstrate that KAPL's justifications are a pretext for discrimination by challenging their veracity or by showing "that another practice would achieve the same result at a comparable cost without having a disparate impact on the protected group." *Smith,* 196 F.3d at 365.

The district court ruled that the jury could have found that the availability of two suitable alternatives—a hiring freeze and a selective expansion of the VSP—exposed KAPL's justification as pretextual. *Meacham,* 185 F.Supp.2d at 214-15. We affirm this result on different grounds, notwithstanding that Judge Homer's ruling was erroneous. A hiring freeze or an extended VSP might have been cost effective, but they are not alternatives to the specific employment practices plaintiffs identified as discriminatory: unaudited and heavy reliance on subjective assessments of "criticality" and "flexibility." Rather, they are replacements for the IRIF itself, which was (and is) a personnel decision justified by KAPL's business objectives. See, e.g., *Atonio v. Wards Cove Packing Co., Inc.,* 10 F.3d 1485, 1502-03 (9th Cir.1993).

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6. Although it denied KAPL's post-verdict motions, the district court noted that the jury erroneously found that KAPL failed to offer a legitimate business justification for terminating plaintiffs' employment through the IRIF. The error was deemed harmless due to the jury's finding with respect to equally effective alternatives. *Meacham,* 185 F.Supp.2d at 213-14.

Appendix A

Faced with the need to cut its workforce and simultaneously to retain employees with critical skills, KAPL undertook a multi-step workforce reduction plan that included a VSP, transfers, retraining, a limitation on new hiring to candidates with critical skills, and—finally—the IRIF. Employers are free to decide that layoffs are necessary; and "criticality" and "flexibility" may be appropriate criteria to use in making a termination decision. But if a particular criterion is subjective (as "flexibility" and "criticality" are), and if (as here) evidence shows that (i) the subjectivity disproportionately impacted older employees; (ii) the employer observed that the disproportion was gross and obvious; and (iii) the employer did nothing to audit or validate the results, then an employer may be liable for discrimination if equally effective alternatives to the challenged features of the employment practice are available.

At least one suitable alternative is clear from the record: KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias. For instance, KAPL's in-house counsel, Richard Correa, spoke to certain managers about certain scores, but his review was far from systematic and appears to have consisted primarily of having a paralegal check the managers' math. A sample of the factors considered in scoring flexibility shows that the criterion was imprecise at best.[7] This evidence, combined

7. According to one set of instructions:

> Flexibility: The individual's flexibility to do other work within KAPL was considered. We considered principally

(Cont'd)

with Dr. Madden's testimony and KAPL's inadequate response when the criticality and flexibility criteria led to extremely skewed results (see the discussion of willfulness below) could easily have led the jury to conclude that KAPL could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs.[8]

We turn now to KAPL's claim that because Dr. Madden did not rule out other causes, plaintiffs failed to establish that KAPL's facially neutral IRIF policy caused the disparate impact on older workers. This argument misconstrues the role statistics play in a disparate impact analysis. Statistical

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(Cont'd)

> ability to do other work within MDO, but kept in mind ability to do other work around KAPL. Highest ratings went to those with demonstrated previous experience in other assignments. For those without as much broad experience as those getting top values, higher ratings were provided to those who had demonstrated flexibility in different types of work within their assignments. For the population below this, points were provided for demonstrated operative behavior in taking on or being asked to take on work. Lowest ratings went to those who had demonstrated resistance to being flexible to new tasks, or who, despite a flexible attitude were limited in their skills.

8. The alternative of reworking the challenged criteria is all but self-evident from the record, particularly since company counsel could have asked for a second (perhaps outside) opinion when he received the IRIF's startlingly skewed results. We are satisfied that the alternative was adequately presented to support the result here.

disparity alone—assuming it is substantial as it was here—raises an inference of causation. *Smith,* 196 F.3d at 365. The Second Circuit cases that KAPL cites for its argument to the contrary are all disparate treatment cases, not disparate impact cases, and (in part because defendants failed to preserve the *Maresco* issue) are not relevant to this disparate impact case. *See* Appellants' Br. at 47 (citing *Bickerstaff v. Vassar College,* 196 F.3d 435, 445-50 (2d Cir.1999); *Hollander v. American Cyanamid Co.,* 172 F.3d 192, 198 (2d Cir.1999); *Raskin v. Wyatt Co.,* 125 F.3d 55, 60, 68 (2d Cir.1997)).

KAPL also argues that Madden's testimony concerning regression analyses was erroneously admitted and that it prejudiced KAPL. Madden admitted at her deposition that she had not performed any regression analyses. Armed with this admission, defense counsel sought to undermine her direct testimony by asking whether she had performed any regression analyses. She answered that she had.[9] On redirect, plaintiffs' counsel asked Madden to describe the analyses she had performed. Over KAPL's objections, the court allowed the testimony but provided that KAPL could recall Madden at a later time and at plaintiffs' expense. Madden then testified that she had found that older workers' performance skills declined disproportionately to those of younger workers between evaluations conducted in 1991 and evaluations conducted in 1995. She also testified that flexibility and criticality scores were much better predictors of who would be laid off than were performance and years of service scores.

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9. She performed these analyses between the deposition and her trial testimony.

We review the district court's evidentiary rulings for abuse of discretion, *see Wolak v. Spucci,* 217 F.3d 157, 161 (2d Cir. 2000), and we reverse only if refusal to do so is "inconsistent with substantial justice," Fed.R.Civ.P. 61. Thus, although Federal Rule of Civil Procedure 26(a)(2) requires disclosure and supplementation as needed of expert reports, any non-prejudicial error the district court may have made does not require reversal. The district court gave KAPL a chance to remediate any prejudice by recalling Madden at plaintiffs' expense. Although KAPL chose not to recall Madden, it did offer extensive testimony from its own expert to rebut Madden's conclusions. Therefore, plaintiffs gained no unfair advantage from their partial failure to disclose. Having addressed KAPL's objections to the jury's disparate impact verdict, we affirm it.

V. The willfulness verdict.

An employee is entitled to liquidated damages equal to his back pay for willful violations of the ADEA. 29 U.S.C. §§ 216(b), 626(b). KAPL challenges the jury's willfulness verdict arguing that (1) it is inconsistent with the jury's finding that KAPL did not intentionally discriminate and (2) in light of KAPL's careful IRIF plan, there was no evidence to support the verdict.

There is no inconsistency in the verdicts. Disparate treatment liability requires that the defendant employer intend to discriminate on the basis of age, *Cronin v. Aetna Life Ins. Co.* 46 F.3d 196, 204 (2d Cir.1995), while an ADEA violation is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the

statute," *Hazen Paper,* 507 U.S. at 614. Given these different standards, a jury could reasonably find both that KAPL did not intentionally discriminate on the basis of age and that it showed reckless disregard for the impact of its IRIF policy on older employees.

We also hold that the jury had sufficient proof of reckless disregard to find willfulness. KAPL's counsel knew that this circuit recognizes a claim for disparate impact under the ADEA. In addition, the IRIF guidelines instructed managers to test for age discrimination by use of the 4/5 test. Geiszler, however, did not use the 4/5 test. Instead, she compared the average age of KAPL's 2000-plus employees before and after the IRIF and found no significant difference. Not only did Madden testify to this method's gross inadequacy, but it is also inconsistent with the methodology we have approved. *See Smith,* 196 F.3d at 365-66 (approving as methods for judging disparate impact, the four-fifths test and the statistical approach used by Madden).

KAPL knew that its IRIF had affected a disproportionate number of older employees. A reasonable jury could have found that KAPL management's failure to challenge Geiszler's patently inadequate approach evinced a desire not to know that the overwhelming—and overwhelmingly disparate—impact of the IRIF was on older workers, and that KAPL's failure to modify its procedures in the face of this disparity reflected a reckless disregard for whether it had violated the ADEA by implementing a policy with such an impact.

Seen in the light most favorable to plaintiffs, the proof demonstrated that KAPL's procedures for guarding against disparate impact age discrimination were inadequate. Some managers who selected employees for termination testified that they received no training on avoiding age discrimination in the IRIF. The review board also received no training on age discrimination and did not monitor for age discrimination. And, as we have outlined, Correa's review was quite limited. The jury reasonably could have found that this proof, too, supported a conclusion that KAPL managers acted in reckless disregard of their obligations under the ADEA.

Because there was sufficient proof of reckless disregard to enable a jury to find that KAPL acted willfully and there is no inconsistency between the disparate treatment and willfulness verdicts, we affirm the jury's verdict on willfulness.

VI. Damages.

A. Mental anguish.

Where plaintiffs offered no proof other than testimony establishing shock, nightmares, sleeplessness, humiliation, and other subjective distress, Judge Homer limited their mental anguish damages to $125,000. The judge limited damages where either physical sequelae or professional treatment was established to $175,000. In some instances, these caps significantly reduced the amounts the jury had awarded. KAPL contends, however, that all awards should have been reduced to between $5,000 and $30,000. In KAPL's

view, the damages must be reduced to this level because (1) the district court failed to address the damages in light of KAPL's good faith and (2) plaintiffs' claims do not rise above garden variety emotional distress claims for which New York courts traditionally uphold awards of no more than $30,000.

In determining whether the mental anguish damages, which stem exclusively from plaintiffs' state law claim, should have been further reduced, we must use New York standards. *Gasperini v. Center for Humanities,* 518 U.S. 415, 431 (1996). New York law provides that jury verdicts may be set aside and new trials ordered where the jury's award "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c). Mental anguish damages must also be "reasonably related to the discriminatory conduct" of the defendant. *In re New York City Transit Auth.,* 573 N.Y.S.2d 49, 54 (NY 1991). The reviewing court looks to "the duration of a complainant's condition, its severity or consequences, any physical manifestations, and any medical treatment." *Id.* at 55. Finally, the reviewing court must determine how the award compares with others awarded for similar injuries and whether it is supported by evidence before the jury. *Id.*

New York cases vary widely in the amount of damages awarded for mental anguish. Many do reduce awards to $30,000 or below. *See, e.g., In re Buffalo Athletic Club,* 672 N.Y.S.2d 210, 211 (App. Div. 4th Dep't 1998); *In re Manhattan and Bronx Surface Transit Operating Auth.,* 632 N.Y.S.2d 642, 644 (App. Div. 2d Dep't 1995); *In re New York State Office of Mental Retardation and Developmental Disabilities,* 583 N.Y.S.2d 580, 582 (App.

Div. 3d Dep't 1992); *In re City of Fulton,* 633 N.Y.S.2d 914, 915 (App. Div. 4th Dep't 1995). However, other cases uphold awards of more than $100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment. *See, e.g., Rio Mar Rest. v. NYSDHR,* 704 N.Y.S.2d 230, 231 (App. Div. 1st Dep't 2000); *In re Allender,* 649 N.Y.S.2d 144, 145 (App. Div. 1st Dep't 1996); *Boutique Indus., Inc. v. NYSDHR,* 643 N.Y.S.2d 986, 986 (App. Div. 1st Dep't 1996). For truly egregious conduct with severe and verified results on a complainant's mental and physical health, courts have upheld awards far in excess of the amounts upheld here. *See, e.g., In re New York City Transit Auth.,* 581 N.Y.S.2d 426, 428-29 (App. Div. 2d Dep't 1992). In addition, the passage of time since the cited cases were decided could reasonably support higher verdicts. When confronted with the range of mental anguish verdicts approved under New York law, we do not find the verdicts in this case to deviate substantially from verdicts awarded under similar circumstances.

B. Front Pay.

Finally, KAPL claims that there was no evidence to support the jury's front pay awards for plaintiffs Deborah Bush, who received $70,625.15 for ten years; Bruce Palmatier, who received $13,211.05 for nine years; David Townsend, who received $25,121.50 for twelve years; and Carl Woodman, who received $42,344.21 for twelve and a half years. KAPL contends that the awards are not justified because plaintiffs have not demonstrated that they continued to make efforts to obtain comparable employment. KAPL also contends that the awards project too far out in the future.

Front pay is available under the ADEA "where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable employment." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir.1984). The employer ordinarily has the burden of demonstrating that suitable employment was available. *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 53 (2d Cir.1998). However, if the employee failed to take reasonable steps to mitigate his damages, the employer need not prove that suitable employment existed and the plaintiff is not entitled to front pay. *Id.* at 54-55. The first issue presented is whether plaintiffs failed to make reasonable efforts to mitigate their damages, thus relieving defendants of the burden to demonstrate the existence of suitable employment.

Each of the plaintiffs obtained employment. Six months after Bush's termination, she found a job as an administrative assistant at a salary lower than she had received at KAPL. She left that job for another job that paid less but gave her better prospects of promotion. By the time of trial, her new job paid her approximately $3,000 less per year than she had been paid at KAPL.

Woodman, who had worked as a specialist in non-destructive testing, was rehired at KAPL as a janitor. Woodman continued to look for jobs in his field. He found a job as a non-destructive tester with another company but continued to look for other opportunities. In early summer 1998, the new company fired him. In November 1998, KAPL rehired him as a non-destructive test inspector, a non-exempt job. He continued to look for a specialist job at KAPL.

Palmatier, who worked as an exempt electrical specialist at the time of the layoffs, returned to KAPL in May 1996 as a non-exempt hourly electrician. With overtime, his wages slightly exceeded the salary he received at the time of layoff. He did not look for non-union work because layoffs are by seniority in the non-exempt ranks and he believed he would have better protection as a member of the union.

In April or May 1996, Townsend, a former specialist, obtained a job as a health physics technician at a KAPL subcontractor. From that position, he became employed as a janitor at KAPL. Later, he was promoted to the position of radioactive waste processor. Townsend also applied for specialist jobs but was turned down. In February 1998, he took a job at KAPL as a radiation technician and has continued to seek promotion within his unit. However, because of his prior experience, Townsend is now wary of applying for exempt positions.

The district court did not clearly err in finding that plaintiffs made reasonable efforts to mitigate damages and that defendants failed to prove that other, more comparable employment existed. Each plaintiff diligently sought employment and reasonably explained why he or she was unable to or chose not to find more remunerative employment.

The amount of time for which front pay will be awarded is committed to the district court's discretion. *See, e.g., Reed v. A.W. Lawrence & Co., Inc.,* 95 F.3d 1170, 1182 (2d Cir.1996). KAPL wholly fails to demonstrate why the district court abused its discretion in choosing time periods between

nine and twelve and a half years as the front pay period for plaintiffs who already had taken substantial steps to mitigate their damages. Therefore, we affirm the front pay awards.

VII. Cross-appeal.

As noted previously, plaintiffs request affirmative relief on their cross-appeal only if the defendants prevail on their appeal. Because we have affirmed the judgment of the district court, we have no need to address the issues raised on the cross-appeal.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DECIDED FEBRUARY 13, 2002

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 97-CV-12 (DRH) (Lead Case),
97-CV-45 (DRH) (Member Case)

February 13, 2002, Decided

CLIFFORD B. MEACHAM; THEDRICK L. EIGHMIE; and ALLEN G SWEET, all individually and on behalf of all other persons similarly situated; and JAMES R. QUINN, PHD; DEBORAH L. BUSH; RAYMOND E. ADAMS; WALLACE ARNOLD; WILLIAM F. CHABOT; ALLEN E. CROMER; PAUL M. GUNDERSEN; CLIFFORD J. LEVENDUSKY; BRUCE E. PALMATIER; NEIL R. PAREENE; WILLIAM C. REYNHEER; JOHN K. STANNARD; DAVID W. TOWNSEND; and CARL T. WOODMAN,

Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, aka KAPL, Inc.; LOCKHEED MARTIN, INC.; and JOHN J. FREEH, individually and as an employee of KAPL and Lockheed Martin,

Defendants.

JAMES R. QUINN, PhD,

Plaintiff,

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v.

KNOLLS ATOMIC POWER LABORATORY, INC., aka KAPL, Inc.; LOCKHEED MARTIN, INC.; and JOHN J. FREEH, individually and as an employee of KAPL and Lockheed Martin,

Defendants.

JUDGES: David R. Homer, UNITED STATES MAGISTRATE JUDGE

OPINION BY: David R. Homer

OPINION:

MEMORANDUM-DECISION AND ORDER

I. Introduction

The twenty-six plaintiffs, all over age forty, were employed by defendant Knolls Atomic Power Laboratory, Inc. ("KAPL") until 1996 when their employment was terminated in an involuntary reduction-in-force (IRIF). Plaintiffs then commenced this class action[1] against KAPL, Lockheed Martin, Inc., KAPL's parent company, and John J. Freeh ("Freeh"), KAPL's President and General Manager, alleging that their terminations violated the Age

1. Two additional employees, Ronald G Butler, Sr. and Janice M. Polsinelle, were members of the class which brought this action. However, the jury found in favor of the defendants on their claims.

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Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the New York Human Rights Law (HRL), N.Y. Exec. Law § 290 *et seq.* (McKinney 2001).[2] Plaintiffs allege that the violations resulted from both disparate treatment and disparate impact. Following trial, a jury returned verdicts in favor of the plaintiffs on their disparate impact theory, in favor of defendants on the disparate treatment theory, and awarded damages totaling $5,077,285.33. Judgment was entered on the verdicts. Am. J. (Docket No. 133).

Presently pending are (1) defendants' motion for judgment as a matter of law, a new trial and remittitur (Docket No. 137); (2) plaintiffs' motion for prejudgment interest, postjudgment interest and an upward adjustment of damages for increased taxes (Docket No. 138); and (3) plaintiffs' motion for attorneys' fees and costs (Docket No. 197). For the reasons which follow, defendants' motion for judgment as a matter of law is denied and their motion for a new trial and remittitur is granted in part and denied in part. Plaintiffs' motion for prejudgment interest is granted in part and denied in part, their motion for postjudgment interest is granted and their motion for an upward adjustment of damages for increased taxes is denied. Finally, plaintiffs' motion for attorneys' fees and costs is granted.

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2. An "opt in" class action may be maintained under the ADEA in accordance with section 16(b) of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b)); *Pandis v. Sikorsky Aircraft Div.*, 431 F. Supp. 793, 796 (D. Conn. 1977).

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II. Background

A. The IRIF

KAPL operates a laboratory to design, build and test prototype naval nuclear reactors and to train United States Navy personnel in their operation and maintenance. KAPL employs approximately 2,700 individuals principally at sites in Niskayuna and West Milton, New York, both within forty miles of Albany. KAPL operates the laboratory under a "cost-plus" contract between the United States Department of Energy (DOE) and Lockheed Martin by which KAPL receives reimbursement for expenses it incurs plus a percentage of those expenses. The contract is overseen by DOE's Schenectady Naval Reactors Office (SNR).

The twenty-six prevailing plaintiffs were employed in exempt, or salaried, positions in various of KAPL's sixteen sections.[3] The sixteen sections were headed by managers who reported directly to Freeh. Each section was also subdivided into sections headed by subsection managers. Certain subsections were further subdivided into units headed by unit managers.

In March 1994, KAPL began formulating a plan to reduce its workforce by approximately 140 positions in accordance with budget projections coordinated between KAPL and SNR. KAPL conceived and adopted a "Workforce Adjustment Plan" (WAP) to achieve the desired reduction in

3. Butler and Polsinelle, the two nonprevailing plaintiffs, were employed in non-exempt, or hourly, positions.

two stages. The first was the "Voluntary Separation Plan" (VSP) by which KAPL offered early retirement to employees with at least twenty years of service in return for the payment of $20,000. The second was the IRIF. In the Fall of 1995, KAPL offered the VSP to its employees. Ultimately, 107 employees applied and were approved for the VSP.

In November 1995, KAPL proceeded with the IRIF.[4] First, KAPL identified the positions within the sixteen sections which were to be eliminated. This "excess skills analysis" sought to determine those positions which KAPL could terminate with the least adverse effect on KAPL's operations. These included, for example, specialized positions in reduced demand. After the employees in those excess positions were identified, the section, subsection and unit managers were directed to evaluate the individuals in those positions by a prescribed process which resulted in the assignment of a numerical score for each employee subject to the IRIF.

First, the managers assigned scores of from zero to ten points to each such employee in four categories: length of service, work performance, criticality to KAPL's operations, and the flexibility of their talents. For length of service, each employee subject to the IRIF was given one point for every two years of service to a maximum of ten points.[5] For work

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4. At the same time, KAPL was recruiting and hiring thirty-five new exempt employees, virtually all of whom were under forty years old.

5. Employees were credited with service to General Electric Company, the parent company of KAPL prior to Lockheed Martin.

performance the subject employees were assigned scores based on their previous two performance evaluations.[6] For criticality and flexibility, subject employees were assigned ratings points in each category by their managers.

Second, subject employees were then placed on matrices grouped by category of excess skill and were ranked according to their numerical scores. The employees with the lowest scores on the matrices were selected for the IRIF.[7] KAPL made efforts to place these employees in other vacant positions within KAPL before final decisions were made. On December 6, 1995, KAPL served notices on thirty-one exempt employees and five non-exempt employees that their employment was terminated in the IRIF effective January 12, 1996.[8] Because of KAPL's security concerns, terminated employees were given three hours after receiving their notice to pack their personal belongings and were then escorted off the premises.

At the time of the IRIF, KAPL employed 2,063 individuals in exempt positions after the VSP. Of those, 1,203, or fifty-eight percent, were forty years of age or older

6. Performance evaluations were required to be done by an employee's manager every twelve to fourteen months.

7. Where employees on the same matrix were tied, the managers performed "paired comparisons" of those employees in the various categories to break the ties.

8. Plaintiff Allen E. Cromer was on disability leave on December 6, 1995. The termination of his employment was extended to May 17, 1996 when he was cleared to return to work.

[hereinafter "older employees"]. Of those, 245 were considered for the IRIF. Of the 245, 179, or seventy-three percent, were older employees. Of the thirty-one exempt employees selected for the IRIF, thirty, or ninety-seven percent, were older employees.[9] The terminated employees received certain benefits, including severance totaling one week of pay for every year of service to a maximum of twenty-six weeks; continuation of benefits for one year; and the free use and services of an employment counseling service outside KAPL.

B. The Trial

Plaintiffs commenced this action on January 6, 1997.[10] Defendants KAPL and Lockheed Martin were named in the ADEA cause of action and all three defendants were named in the HRL cause of action. Plaintiffs alleged two theories of liability under both the ADEA and the HRL—disparate treatment and disparate impact. Compl. (Docket No. 1). Defendants' motion to bifurcate the trial between liability and damages was granted, Docket No. 59, and the trial on liability commenced before a jury on June 20, 2000. On July

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9. Five non-exempt employees were also selected for the RIF. Three were over forty years of age.

10. Plaintiff James R. Quinn commenced a separate action on January 10, 1997 alleging the same claims as well as a claim for breach of an employment contract. In the Memorandum-Decision and Order of United States District Judge Lawrence E. Kahn filed March 20, 1998, the defendants' motion to dismiss the contract claim was granted. *Quinn* Docket No. 15. The two actions were consolidated for all other purposes. *Id.*; *see also Meacham* Docket No. 15.

26, 2000, the jury returned a verdict finding under plaintiffs' disparate impact theory that the defendants had discriminated against the twenty-six exempt employees and that such discrimination had been willful. The jury found in favor of defendants on plaintiffs' disparate treatment theory of discrimination. Docket No. 86.

Prior to the commencement of the damages phase of the trial, eight plaintiffs[11] settled their claims with defendants. *See* Docket Nos. 111-17 & 121. The trial on damages commenced before the same jury on September 19, 2000. Evidence was presented in four groups of plaintiffs with four or five plaintiffs in each group and with the jury returning a separate verdict for each group. The verdict for the final group was returned on November 22, 2000. The jury's verdicts on damages awarded the remaining eighteen prevailing plaintiffs total damages as follows:

Plaintiff	Total Amount Awarded
Raymond E. Adams	$ 411,823.13
Wallace Arnold	$ 526,825.81
Deborah L. Bush	$ 246,509.50
William R. Chabot	$ 119,734.85
Allen E. Cromer	$ 109,386.97
Thedrick L. Eighmie	$ 91,445.00
Paul M. Gundersen	$ 160,218.71
Clifford J. Levendusky	$ 190,605.55

11. Frank A. Paxton, Bruce E. Vedder, David J. Kopmeyer, Arthur J. Kaszubski, James S. Chambers, Teofils F. Turlais, Hildreth E. Simmons and Henry Bielawski.

Clifford B. Meacham	$ 125,000.00
Bruce E. Palmatier	$ 332,126.09
Christine A. Palmer[12]	$ 78,812.50
Neil R. Pareene	$ 283,783.95
James R. Quinn	$ 68,921.04
William C. Reynheer	$1,115,357.58
John K. Stannard	$ 258,189.40
Allen G. Sweet	$ 128,953.46
David W. Townsend	$ 397,482.91
Carl T. Woodman	$ 432,108.88

Docket Nos. 119, 124, 126 & 128. Judgment was entered on the verdicts. Docket No. 133. These motions followed.

III. Defendants' Motion

Defendants move for an order (1) granting judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), or in the alternative (2) granting a new trial pursuant to Fed. R. Civ. P. 59, or (3) granting remittitur on certain of plaintiffs' damage awards.

A motion for judgment as a matter of law under Rule 50 should be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the moving] party on that issue." Fed. R. Civ. P. 50(a)(1). The standard under Rule 50 "mirrors" that for a motion for summary judgment under Fed. R. Civ. P. 56. *Anderson v. Liberty Lobby*,

12. During the pendency of these motions, plaintiff Christine A. Palmer settled her claims with defendants and her claims have been dismissed. Docket Nos. 208, 209. There thus remain seventeen plaintiffs on these motions.

Inc., 477 U.S. 242, 250-51, 106 S. Ct. 2505 (1986). On a motion under Rule 50, a court must consider all evidence in the record and not simply the evidence favorable to the nonmovant. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149, 120 S. Ct. 2097 (2000); *Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir. 2001). "In doing so, however, the court must draw all reasonable inference in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 149 (citations omitted). Thus, in reviewing the entire record, a court should consider only that evidence favorable to the nonmoving party and any evidence supporting the moving party which is uncontradicted and unimpeached. *Id.*

The standard for granting a new trial under Rule 59 is less demanding. "[U]nlike a motion for judgment as a matter of law, a trial judge considering a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998) (internal quotations and citation omitted); *see also Funk v. F & K Supply, Inc.*, 43 F. Supp.2d 205, 224 (N.D.N.Y. 1999) (McAvoy, J.). Thus, " 'a motion for a new trial may be granted even if there is substantial evidence to support the jury's verdict.' " *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 54 (2d Cir. 2000) (quoting *Landau*, 155 F.3d at 104). A court should grant a new trial if "convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Caruolo*, 226 F.3d at 54 (internal quotations and citation omitted).[13]

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13. As to the legal standard applicable to defendants' motion for remittitur, see section II(C) *infra*.

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A. Timeliness

A motion for judgment as a matter of law and for a new trial following a jury verdict must both be filed within ten days of the entry of judgment. Fed. R. Civ. P. 50(b), 59(b). The original judgment in this case was filed on December 5, 2000. Docket No. 131.[14] Thus, excluding Saturdays, Sundays and legal holidays as required by Fed. R. Civ. P. 6(a), defendants' motion was required to be filed on or before December 19, 2000. On December 19, 2000, defendants filed the instant notice of motion and a supporting affidavit. Docket No. 137. In an order filed the same day, defendants were granted until February 1, 2001 to file and serve supplemental pleadings in support of their motion. Docket No. 136. Defendants timely filed a memorandum of law in support of their motion on February 1, 2001. Docket No. 196. As a threshold matter, plaintiffs now contend that defendants' motion is untimely because their memorandum of law was not filed within the ten days required by the rules. Pls. Mem. of Law (Docket No. 203) at 2-6.

The ten day time limit for this motion is jurisdictional and could not be extended. *See Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397, 401 (2d Cir. 2000) (describing time limit as "uncompromisable"); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 230 (2d Cir. 2000); Fed. R. Civ. P. 6(a). If a motion is not filed within the ten day period, the district court is divested of jurisdiction to consider the motion. *See Weissman*, 214 F.3d at 230. There is no dispute

14. An amended judgment was filed on December 11, 2000. Docket No. 133.

that defendants completed the filing and service of their notice of motion and supporting affidavit within the ten day period. Plaintiffs' contention here thus requires a determination of when a motion is deemed filed for purposes of Rules 50 and 59.

Generally, a motion is deemed filed when it is delivered to the Clerk's Office. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 85 (2d Cir. 2000). Defendants' notice of motion and affidavit were delivered to the Clerk's Office and served within the ten day period. Plaintiffs argue that such filing was not effective for purposes of Rules 50 and 59, however, because the papers filed failed to include a memorandum of law as required by N.D.N.Y.L.R. 7.1(a)(1) and 7.1(g). Plaintiffs also argue that allowing defendants to file their memorandum of law six weeks after their notice of motion was filed circumvents the purpose of the ten day limits in Rules 50 and 59.

Plaintiffs arguments fail for at least two reasons. First, defendants' motion was accepted for filing by the Clerk and the Court on December 19, 2000 and for that reason alone should be deemed filed as of that date. *See Wight*, 219 F.3d at 85 (holding that the district court's treatment of a motion filed under Rule 59 as timely supported the conclusion that the motion timely filed even though supplemental pleadings were filed after the ten day period to cure technical defects in the original pleadings). Second, the requirement in the local rules that a memorandum of law accompany any motion may be excused or delayed if "good cause is shown." N.D.N.Y.L.R. 7.1(b)(3). Here, given the length and complexity of the trial and the fact that a transcript of the

trial was not completed until January 9, 2001 (Docket Nos. 143-95), good cause existed for permitting defendants additional time to file and serve their memorandum of law. Thus, the delayed filing of the memorandum of law did not vitiate the timeliness of defendants' motion under the local rules. Moreover, a district court possesses the inherent power to authorize departures from the requirements of its local rules. *See Somlyo v. J. Lu-Rob Enters.*, 932 F.2d 1043, 1048-49 (2d Cir. 1991) ("it is the business of the district court to determine whether fairness demands that noncompliance [with local rules] be excused"); *see also Wight*, 219 F.3d at 85-86 (approving the district court's " 'tailor[ing] the Local Rules to best achieve a just outcome.' ") (quoting *Somlyo*, 932 F.2d at 1049).

Accordingly, defendants' motion here was timely filed and plaintiffs' contention to the contrary must be rejected.

B. Liability

A plaintiff may establish violations of the ADEA and the HRL under theories of disparate treatment and disparate impact. *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 115 (2d Cir. 1992); *see also Smith v. Xerox Corp.*, 196 F.3d 358, 363 n.1 (2d Cir. 1999) (holding that claims under the ADEA and the HRL "are analyzed identically"); *Gonzalez v. City of New York*, 135 F. Supp. 2d 385, 399-400 & nn.9, 11 (E.D.N.Y. 2001) (holding that disparate impact age discrimination claim may be asserted under the HRL and analyzed identically to those brought under the ADEA). Disparate treatment requires evidence that an employer intentionally discriminated against a person forty

years of age or older while "[d]isparate impact . . . results from the use of employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on a protected group and cannot be justified by business necessity." *Maresco*, 964 F.2d at 115 (internal quotation and alteration omitted); *see also District Council 37, AFSCME v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997). Disparate impact age discrimination does not require proof of discriminatory intent. *Smith*, 196 F.3d at 364 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S. Ct. 849 (1971)). Rather, the disparate impact theory addresses employment practices "that are fair in form but discriminatory in impact." *Griggs*, 401 U.S. at 431, 91 S. Ct. 849. Although courts of appeals are divided over the viability of the disparate impact theory under the ADEA, this theory of proof remains available in the Second Circuit. *See Smith*, 196 F.3d at 367 & n.6.

To recover under a disparate impact claim, a plaintiff must first establish a prima facie case "by identifying a specific employment practice which, although facially neutral, has had an adverse impact on her as a member of a protected class." *Smith*, 196 F.3d at 364 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S. Ct. 2777 (1988)); *Knighton v. City of Syracuse Fire Dep't*, 145 F. Supp. 2d 217, 224 (N.D.N.Y.2001) (Scullin, C.J.); *Gonzalez*, 135 F. Supp. 2d at 399; *Hogan v. General Elec. Co.*, 109 F. Supp. 2d 99, 104 (N.D.N.Y.2000) (Hurd, J.). The burden then shifts to the employer to offer a business necessity for the challenged employment practice. *Smith*, 196 F.3d at 365; *Hogan v. Metromail*, 167 F. Supp. 2d 593, 595 (S.D.N.Y. 2001). If an employer offers such a business necessity, the

burden then returns to the plaintiff to "show that the employer's proffered reason was merely a pretext for discrimination." *Id.*; *Knighton*, 145 F. Supp.2d at 224. Defendants contend on this motion that plaintiffs failed at each of these steps of their claim and as well failed to establish that the defendants' conduct was willful or that defendants were liable under the HRL.

1. Plaintiffs' Prima Facie Case

Defendants contend that plaintiffs' evidence failed to establish a prima facie case as a matter of law because (a) plaintiffs failed to identify a facially neutral employment practice, (b) the statistical evidence was insufficient, and (c) the testimony of plaintiffs' statistical expert witness was improperly admitted and insufficient. Defs. Mem. of Law at 8-16.

First, however, the issue presented here follows a trial on the merits. "It is well-established that once a [discrimination] case has been fully tried on the merits, the question whether the plaintiff has established a prima facie case is no longer relevant." *Ottaviani v. State Univ. of New York*, 875 F.2d 365, 373 (2d Cir. 1989) (citing *Mitchell v. Baldrige*, 245 U.S. App. D.C. 60, 759 F.2d 80, 83 (D.C. Cir. 1985)) (internal quotations omitted).[15] Thus, "the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination." *Bazemore v. Friday*, 478

15. *Ottaviani* was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. However, discrimination cases under Title VII, the ADEA and the HRL are analyzed identically. *See Smith*, 196 F.3d at 362 n.1.

U.S. 385, 398, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986). Because this case has been fully tried, defendants' motion on this ground is denied since the only cognizable issue at this stage is whether plaintiffs proved discrimination. In the alternative, however, defendants' arguments concerning plaintiffs' prima facie case are considered on their merits.

a. Facially Neutral Employment Practice

Plaintiffs' initial burden under the disparate impact theory required, *inter alia*, that they identify "a specific employment practice which, although facially neutral, has had an adverse impact on" older employees. *Smith*, 196 F.3d at 364; *Gonzalez*, 135 F. Supp. 2d at 399. Plaintiffs identified "the implementation of the exempt employee [IRIF] portion of the WAP." Pls. Mem. of Law (Docket No. 203) at 11-13. Defendants contend that this employment practice was insufficiently specific to satisfy plaintiffs' burden.

The requirement that a plaintiff specify the employment practice which he or she alleges caused the discrimination serves to insure that an employer not be held liable for discrimination simply because a result appeared discriminatory numerically. *See Smith*, 196 F.3d at 367-68; *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-58, 104 L. Ed. 2d 733, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). Thus, "a plaintiff generally cannot rely on the overall decision-making process . . . [as] a specific employment practice." *Smith*, 196 F.3d at 367.

Plaintiffs contend that because the implementation of the guidelines for the IRIF was a component of defendants'

WAP, which included other components such as the VSP, employee retraining and transfers, their specification of the "implementation" of the IRIF satisfied its burden of identifying a specific employment practice. Such identification, however, actually specifies the decision-making process by which exempt employees were selected for the termination of their employment. The implementation identified here by plaintiffs retains all the elements of overall decision-making regarding the IRIF, which itself was comprised of various elements. The fact that defendants' implementation of the IRIF was a subpart of the larger WAP does not of itself render it a "specific" employment practice sufficient to satisfy plaintiffs' initial burden.

Nevertheless, a general decision-making process such as that identified by plaintiffs here may serve as the specified employment practice "if the plaintiff can show that the elements of the employer's decision-making process are not capable of separation for analysis." *Smith*, 196 F.3d at 368 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i)). The trial testimony established that exempt employees were selected for the IRIF pursuant to "Salaried Employee Reduction-in-Force Guidelines." Those guidelines established four criteria by which managers were to select exempt employees for the IRIF. Employees considered for the IRIF were given up to ten points in each for: company service, performance, flexibility and criticality. Points were totaled for each exempt employee considered for the IRIF and the exempt employees with the lowest point totals were selected for the IRIF. These guidelines were facially neutral, were followed by all managers in selecting exempt employees for the IRIF, and led directly to the selection of plaintiffs for the IRIF.

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The criterion for service was objective on its face, but because it denied credit to employees for any period of employment beyond twenty years, it arguably had a disproportionate impact on employees with lengthy periods of employment with defendants, all of whom were over forty years of age.[16] The remaining three criteria required the application of objective standards in various categories.[17] The points assigned for the four criteria were then totaled to determine which employees would be selected for the IRIF.

Thus, various factors were considered for each criterion and the four criteria were considered as a group to determine selection for the IRIF. The evidence adduced by plaintiffs at trial, principally that of KAPL personnel regarding the guidelines and plaintiffs' statistical expert witness, sufficed to establish that no particular factor and no particular criterion caused the disparate impact on older employees. Rather, the evidence established that, as asserted by plaintiffs, such impact resulted from the implementation of the guidelines and that the various factors and criteria, the elements of defendants' decision-making, reasonably were "not capable of separation for analysis." *Smith*, 196 F.3d at 368. Thus, in the circumstances of this case, plaintiffs' identification of the implementation of the guidelines for selecting exempt employees for the IRIF satisfied plaintiffs' initial burden of proof.

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16. The most extreme example was presented by plaintiff Clifford B. Meacham. Meacham had been employed by KAPL and General Electric for over forty-three years but received credit under the guidelines for only twenty years of employment.

17. For example, advanced degrees, training and prior experience were considered for flexibility and criticality.

b. Sufficiency of Plaintiffs' Statistical Evidence

Defendants next contend that plaintiffs failed to satisfy their initial burden of demonstrating that any statistical disparity against plaintiffs was caused by age discrimination. Defs. Mem. of Law at 11-14. Plaintiffs respond that the statistical evidence offered through their expert witness sufficed to meet this burden. Pls. Mem. of Law at 13-19.

After a plaintiff specifies the employment practice responsible for the adverse impact on older employees, a plaintiff must then demonstrate, generally through statistical data, that the employment practice caused a significant disparity in outcome between older employees and younger employees. *See Smith*, 196 F.3d at 364-65 (citing *Watson*, 487 U.S. at 994-95). Where a plaintiff relies on a statistical disparity to meet this burden, that disparity "must be sufficiently substantial to raise an inference of causation." *Id.*; *see also Watson*, 487 U.S. at 994 (holding that statistical evidence at this stage must be "of a kind and degree sufficient to" infer discrimination); *Gonzalez*, 135 F. Supp. 2d at 399.

No bright line rules have been established to determine the sufficiency of statistical evidence at this stage. *See Ottaviani*, 875 F.2d at 373 ("in accordance with Supreme Court pronouncements, we must reject appellants' suggestion that this court announce a rule of law with respect to what level of statistical significance automatically gives rise to a rebuttable presumption of discrimination."); *see also Smith*, 196 F.3d at 365 ("no bright line rules exist"). However, courts generally require a plaintiff to meet two requirements. First, a "plaintiff must identify the correct population for analysis."

Smith, 196 F.3d at 368. Generally, this population will be those employees who were subject to the employment practice in question. *See id.*; *Lander v. Montgomery County Bd. of Commissioners*, 159 F. Supp. 2d 1044, 1060 (S.D.Ohio 2001); *Shah v. New York State Dep't of Civil Serv.*, No. 94 CIV 9193 RPP, 2001 WL 839986, at *7 n.7 (S.D.N.Y. July 25, 2001).

Here, plaintiffs identified four possible populations through the testimony of their expert witness, Dr. Janice Fanning Madden. Included in the four groups were all exempt employees at KAPL and those 245 exempt employees who were actually considered for the IRIF. Madden Tr. (Docket No. 154) at 17-18. There was sufficient evidence from which the jury could reasonably find that either group was the correct population for purposes of comparison. As to the population of exempt employees, the implementation of the IRIF commenced with that population within which those employees with excess skills were identified. Moreover, in its own internal analysis of the statistical impact of the IRIF on older employees, KAPL itself chose the population of 2.063 exempt employees for purposes of analysis. *See, e.g.*, Madden Tr. at 34; *see also* Fed.R.Evid. 801(d)(2) (admission by party-opponent). Thus, the record contained sufficient evidence from which the jury could conclude that the correct population for purposes of comparison was KAPL's entire population of exempt employees.

There was also evidence from which the jury could find that the correct population was comprised of the 245 exempt employees whose positions were identified during the excess skills analysis as subject to the IRIF. It was this more limited

group who were placed on the matrices and whose numerical scores were compared according to the procedures prescribed in the WAP. Thus, it was this group of exempt employees who were actually and universally subject to all aspects of defendants' implementation of the guidelines for selecting exempt employees for the IRIF—the employment practice identified by plaintiffs in their prima facie case. Accordingly, the record also contained sufficient evidence from which the jury could conclude that the correct population for purposes of comparison was the exempt employees who were placed on the matrices, *i.e.*, those actually considered for the IRIF. *See Smith*, 196 F.3d at 368 ("The [correct] population in a reduction-in-force situation consists of workers subject to termination.").

The second requirement is that a plaintiff demonstrate a statistically sufficient comparison between the predicted result for older employees in the population selected and the actual result. *Ottaviani*, 875 F.2d at 371; *see also Smith*, 196 F.3d at 366 (referring to "expected result" and "obtained result" rather than "predicted result" and "actual result"); *Hogan*, 109 F. Supp. 2d at 104. This comparison serves to determine whether there is a statistically significant disparity between the predicted and actual results. For this case a predicted result is determined by the percentage of older employees in the population of employees subject to the IRIF. The actual result constitutes the percentage of older employees actually selected for the IRIF in the population subject to the IRIF. A comparison of the predicted and actual results must be made to determine if a statistically significant disparity exists. *Smith*, 196 F.3d at 365-66; *Ottaviani*, 875 F.2d at 371.

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"Statistical significance" measures "the probability that a disparity is simply due to chance rather than any other identifiable factor." *Ottaviani*, 875 F.2d at 371. One measure of statistical significance is standard deviation. *See Smith*, 196 F.3d at 365-66; *Ottaviani*, 875 F.2d at 371. Standard deviation is a "unit of measurement used to express the probability that an [actual] result is merely a random deviation from a predicted result." *Ottaviani*, 875 F.2d at 371. Generally, " '[t]he greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the [predicted] and [actual] results.' " *Id.* (quoting *Coates v. Johnson & Johnson*, 756 F.2d 524, 536 (7th Cir. 1985)). If the actual result varies from the predicted result by two standard deviations,[18] "[courts] generally consider this level of significance sufficient to warrant an inference of discrimination." *Smith*, 196 F.3d at 366; *see also Ottaviani*, 875 F.2d at 371-72.

Here, as to the population of 2.063 exempt employees, there were 1,203, or fifty-eight percent, who were older employees. The predicted result from this population for the thirty-one exempt employees whose employment was terminated in the IRIF was thus fifty-eight percent of thirty-

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18. Two standard deviations equates approximately "to a 1 in 20 chance that the outcome is a random fluctuation.Three standard deviations corresponds to approximately a 1 in 384 chance of randomness. Finally, a range of four to five standard deviations corresponds to a probability range of 1 chance in 15, 786 to 1 chance in 1,742,160." *Ottaviani*, 875 F.2d at 372 n.7 (citing M. Abramowitz & I. Steigan, *Handbook of Mathematical Functions*, National Bureau of Standards, U.S. Government Printing Office, Applied Mathematics Series No. 55 (1966) (Tables 26.1, 26.2)).

one, or eighteen older employees. The actual result was that thirty of the thirty-one employees, or ninety-seven percent, whose employment was terminated in the IRIF were older employees. According to Dr. Madden, there was one chance in 348,000 that this actual result would occur. Madden Tr. at 20. This constitutes between four and five standard deviations.

As to the population of 245 exempt employees placed on the matrices and actually considered for the IRIF, there were 179, or seventy-three percent, who were older employees. The predicted result from this population for the thirty-one exempt employees whose employment was terminated in the IRIF was thus seventy-three percent of thirty-one, or twenty-three older employees. The actual result was thirty, or ninety-seven percent. According to Dr. Madden, there was one chance in 1,260 that this actual result would occur. Madden Tr. at 25-27. This constitutes between three and four standard deviations.[19]

Thus, whether the jury found that the correct population for comparison was the 2,063 exempt employees subject to the IRIF or the 245 exempt employees who were placed on

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19. Dr. Madden testified that she also analyzed the population of 245 employees who were placed on the matrices controlling for the particular matrix on which an employee was placed (*i.e.*, controlling for the particular group of employees against whom an employee was compared). From this analysis, Dr. Madden concluded that there was one chance in seventy-three, or between two and three standard deviations, that an actual result of thirty older employees out of thirty-one selected for the IRIF would occur. Madden Tr. at 23-27.

matrices and actually considered for the IRIF, the statistical disparity substantially exceeded two standard deviations, permitting the jury to draw the inference that the disparity was caused by age discrimination. There was, therefore, sufficient evidence from which the jury could find that plaintiffs had satisfied their initial burden as to either group. Based on this evidence alone, defendants' contention that plaintiffs failed to meet their initial burden of demonstrating that the statistical disparity was caused by age discrimination must be rejected.

However, this conclusion is further supported by testimony offered by Dr. Madden during her redirect examination. The statistical evidence described above assessed the evidence to determine the probability that the statistical disparity between the predicted and actual results deviated from the norm by chance or for some other reasons, such as age discrimination. According to Dr. Madden, she also performed multiple regression analyses—"a statistical test which identifies factors, called independent variables, that might influence the outcome of an observed phenomenon, called a dependent variable." *Smith*, 196 F.3d at 363 n.3. By this method, a statistician seeks to identify legitimate factors, other than age discrimination here, which may have influenced or caused the statistical deviation from the norm. *Id.*

Dr. Madden testified that she performed multiple regression analyses to determine if the statistical disparity could be explained by the individual components of the employees' numerical ratings on the matrices—years of service, performance appraisals, flexibility and criticality.

Dr. Madden concluded that there was no significant correlation between an employees' years of service and the likelihood that he or she would be selected for the IRIF. Madden Tr. at 88. As to the other three components, Dr. Madden found that there existed statistically significant age effects in that older employees were more likely than younger employees to have experienced a decline in their performance appraisals after KAPL began planning for the IRIF and generally in the ratings for flexibility and criticality. *Id.* at 88-89. This evidence further supported the jury's finding that plaintiffs' satisfied their burden of proof to establish a prima facie case.

Accordingly, defendants' contention that there was insufficient evidence to establish a prima facie case must be rejected.

c. Evidence of Multiple Regression Analyses

Defendants contend that Dr. Madden's testimony regarding multiple regression analyses was erroneously admitted in evidence. Defs. Mem. of Law at 14-16.

Dr. Madden made no mention of multiple regression analyses in her expert witness reports, her deposition before trial or during her direct examination at trial. On cross-examination at trial, however, Dr. Madden was asked by defendants' counsel at least three times about additional analyses she had conducted. Madden Tr. at 38-39, 56-58, 76-77. In none of his questions did defendants' counsel limit Dr. Madden to analyses conducted prior to her reports or her deposition, and Dr. Madden testified each time that she had

in fact conducted such analyses following her deposition and prior to trial. *Id.* In the most detailed colloquy, Dr. Madden was questioned as follows:

> Q. You did not do a regression analysis for criticality, did you?
>
> A. Yes.
>
> Q. And did you do one for flexibility?
>
> A. Yes.
>
> . . .
>
> Q. And for performance?
>
> A. Yes.
>
> Q. And for company service?
>
> A. Yes.

Madden Tr. at 58. On redirect examination, plaintiffs' counsel asked Dr. Madden the results of her multiple regression analyses. *Id.* at 83. Defendants' counsel objected that such analyses had not previously been disclosed to defendants. *Id.* The objection was overruled on the ground that the questions of defendants' counsel had "opened the door" and unless plaintiffs' counsel was permitted to ask Dr. Madden about these analyses, the jury could infer that her analyses were unfavorable to plaintiffs. *Id.* at 83- 87. Dr. Madden then testified to the results of her multiple regression analyses. *Id.* at 87-89.

A trial court is accorded "substantial deference" in making evidentiary rulings and those rulings are reviewed

only for clear abuse of discretion. *Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 266 (2d Cir. 1999); *see also Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 619-20 (2d Cir. 1991). "Further, even an erroneous evidentiary ruling will not lead to reversal unless affirmance would be 'inconsistent with substantial justice.' " *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997) (quoting Fed. R. Civ. P. 61).

Here, the ruling on defendants' objection was proper. Defendants' questions to Dr. Madden did not limit her answers to analyses she performed prior to her reports or her deposition. Defendants elicited testimony from Dr. Madden that she had performed multiple regression analyses but left unanswered the results of those analyses. If plaintiffs had not been permitted to elicit those results, the jury could reasonably have inferred that Dr. Madden's analyses were adverse to plaintiffs. Thus, the testimony of Dr. Madden on redirect examination was properly admitted and was not an abuse of discretion. *Cf. Caruolo v. A C & S, Inc.*, 1999 U.S. Dist. Lexis 3022, No. 93 CIV. 3752(RWS), 1999 WL 147740, at *14 (S.D.N.Y. Mar. 18, 1999) (holding that cross-examination by defendants of plaintiffs' expert witness opened the door to the admission of additional testimony on redirect examination of tests conducted by another expert and reported in a treatise), *aff'd in part and rev'd in part on other grounds*, 226 F.3d 46 (2d Cir. 2000).

Moreover, while the testimony of Dr. Madden in this regard supported plaintiffs' claims, that testimony was limited, taking no more than two to three minutes (less than two pages of transcript) in a trial that lasted five weeks during the liability phase alone. Its secondary importance is also

underscored by the limited time devoted to it by counsel during their summations. Accordingly, even if the admission of this evidence was erroneous, any such error was harmless. *See* Fed.R.Evid. 61. Defendants' contention here must, therefore, be rejected.

2. Defendants' Burden of Production

Plaintiffs having satisfied their burden of establishing a prima facie case, the burden then shifted to defendants to offer a business justification for the challenged employment practice. *See Griggs*, 401 U.S. at 432; *Smith*, 196 F.3d at 365. The jury here found that defendants failed to meet this burden. Special Verdict (Docket No. 86) at 11. Defendants contend that this finding was erroneous as a matter of law. Defs. Mem. of Law at 17-21. Plaintiffs disagree. Pls. Mem. of Law at 19-20.

An employer's burden at this stage is to demonstrate "a legitimate business justification" for the challenged employment practice. *Wards Cove*, 490 U.S. at 643. The employer's burden is one of production, not persuasion, as the burden of persuasion remains with the plaintiff throughout the case. *See id.*; *Watson*, 487 U.S. at 1008; *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 120 (2d Cir. 1999). An employer meets this minimal burden by articulating a business necessity or reason for the employment practice. *See Watson*, 487 U.S. at 1008.

The jury found that defendants had not met this burden. Defendants first argue that the jury was asked the "wrong question." Defs. Mem. of Law at 17. The verdict form asked

the jury whether any defendant "has articulated a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force?" Special Verdict at 11. Defendants failed to object to this question prior to its submission to the jury. Charge Conference Tr. (Docket No. 163) at 44-48. Thus, the question must rise to the level of plain error to be cognizable. *See Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 96 (2d Cir. 1998) (applying plain error review where party failed to object to proposed special verdict form). Defendants do not claim plain error here and none appears from the record. Second, defendants fail to specify in what respect the question was incorrect and the question appears to reflect accurately defendants' burden at this stage.[20]

The business justification offered by defendants was the budgetary need to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions. Defs. Mem. of Law at 18. The presentation of this justification sufficed to satisfy defendants' burden of production. *See Wards Cove*, 490 U.S. at 643, 109 S. Ct. 2115. The consideration of defendants' justification at this stage permitted no qualitative assessment of its sufficiency by, for example, weighing defendants' business justification

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20. Defendants also argue that the jury's finding on this question was somehow inconsistent with its finding on the disparate treatment theory. The two theories required proof of different elements and, therefore, the jury's findings were not internally inconsistent. *See Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592, 598 (2d Cir. 2001) (holding that first question is whether asserted inconsistency can be resolved). Defendants' argument must, therefore, be rejected.

against other evidence in the case. *See Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982) (holding that the wisdom of a business justification may not be questioned). Only if the business justification offered here was weighed against other evidence could the jury have found that defendants failed to meet their burden of production. Thus, as a matter of law, defendants met their burden of production at this stage.

As noted above, the jury found to the contrary.[21]

21. The jury was instructed as follows on defendants' burden of production:

> The second step requires you to determine whether the defendants have rebutted the presumption of discrimination arising under the first step of this theory. Under this step, the defendants must articulate, but not prove, a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force. This is *not* a burden of proof on the defendants and does not require the defendants to prove by any standard that the reason offered was the only reason for their decision to terminate the employment of the plaintiffs. Rather, the defendants have satisfied their burden in this step if you find that the defendants have presented a business justification for the selection of the plaintiffs for termination of their employment in the reduction-in-force. You need not find, nor need the defendants prove, that such justification was essential or indispensable to the defendants' business. If you find that the defendants have met this minimal burden, the presumption of discrimination arising under the first step is rebutted and plays no further part in your deliberations.

Jury Charge (Docket No. 85) at 28. The jury was also instructed not

(Cont'd)

Nevertheless, this erroneous finding does not merit judgment as a matter of law or a new trial. First, although not required to do so in light of its finding that defendants failed to meet their burden of production, the jury proceeded to make findings at the third and final stage. The jury's findings at the third and final stage obviated the error made on defendants' burden of production and rendered that error harmless. *See Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S. Ct. 1239 (1946); *Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2d Cir. 1998) (holding that "when we are able to conclude that the verdict was not substantially influenced by the alleged error, then we may be quite confident the objecting party's rights were not prejudiced and may uphold the general verdict"). Second, as noted above, the issue presented here follows a trial on the merits. Thus, issues related to defendants' burden of production are not relevant at this stage and the only question is whether there was sufficient evidence to support the jury's ultimate finding of discrimination. *Ottaviani*, 875 F.2d at 373; *Mitchell*, 759 F.2d at 83.

Therefore, defendants satisfied their burden of production at the second stage as a matter of law. However, the jury's contrary finding in the circumstances of this case does not warrant granting defendants' motion for judgment as a matter of law or for a new trial. Defendants' motion on this ground is denied.

(Cont'd)
to answer the ultimate question regarding discrimination if it found that defendants' had not satisfied their burden of production. Jury Verdict at 11.

3. Discrimination

Defendants also contend that insufficient evidence was offered to support the jury's finding at the final stage that defendants' business justification for implementation of the guidelines for the IRIF was a pretext for age discrimination. Defs. Mem. of Law at 21-22.

"Even if the employer successfully defends the business necessity of the practice, the plaintiff may still prevail if she can show that the employer's proffered explanation was merely a pretext for discrimination." *Smith*, 196 F.3d at 365. One method by which a plaintiff may demonstrate pretext in a disparate impact case is by evidence "that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group." *Id.* (citing *Wards Cove*, 490 U.S. at 660-61).

Here, plaintiffs offered evidence from which the jury could find that either of two alternative practices were available to defendants to achieve the same result without causing a disparate impact on older employees. First, defendants could have instituted a temporary hiring freeze to achieve manpower limits. The evidence at trial established that following the VSP, KAPL was only one employee over its manpower ceiling. However, KAPL desired to hire an additional thirty-five new exempt employees. Freeh Tr. (Docket No. 143) at 25-26, 43-44. Second, KAPL could have offered the VSP to a greater number of employees to achieve the desired manpower reduction. The evidence established that a broadened VSP would have attracted sufficient employees to reduce KAPL's manpower to the desired level,

its cost would have been no greater than that of the IRIF, KAPL could have rejected the VSP applications of any employees with critical skills, and any adverse impact on older employees would have been avoided. *Id.* at 44-49.

There is little dispute that either alternative offered by plaintiffs would have permitted defendants to achieve desired manpower levels at costs comparable to the cost of IRIF. Defendants argue, however, that plaintiffs failed to adduce evidence that either alternative would have been equally effective as the IRIF in maintaining the mix of essential skills among employees which KAPL required to perform its functions. There was evidence[22] from which the jury could have found that a limited hiring freeze would not have impaired KAPL's ability to perform its functions given the availability of employees with critical skills within the over 2,000 exempt employees. Moreover, the jury could also find with respect to the broadened VSP alternative that KAPL could have retained employees with skills deemed critical by rejecting the applications of those employees. Thus, there was sufficient evidence before the jury from which it could conclude that the alternatives offered by plaintiffs would have been equally effective as the IRIF. Defendants' motion for judgment as a matter of law and a new trial on this ground is denied.

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22. Defendants argue that the testimony of KAPL officials that the alternatives offered by plaintiffs would not be equally effective was unrebutted by plaintiffs and, therefore, should be accepted. The testimony of all such witnesses, however, was challenged and impeached by plaintiffs, and the jury was entitled to reject such testimony. After these issues were fully developed at trial and in light of the jury's findings, a court may not substitute its judgment on the credibility of witnesses for that of the jury. *See Reeves*, 120 S. Ct. at 2110 (citations omitted).

4. Willfulness

The ADEA mandates liquidated damages for a plaintiff, in an amount equivalent to a plaintiff's award for back pay and benefits, if a jury finds that the employer's violation of the ADEA was willful. 29 U.S.C. § 626(b); *see also McGinty v. State of N.Y.*, 193 F.3d 64, 68 (2d Cir. 1999). The jury here found that defendants KAPL and Lockheed Martin acted willfully in discriminating against plaintiffs, entitling each prevailing plaintiff to liquidated damages. Special Verdict at 12. Defendants contend that this finding was erroneous as a matter of law. Defs. Mem. of Law at 23-24.

An employer acts "willfully" under the ADEA "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993). (citations and quotations omitted). Thus, either knowledge or reckless disregard is required to establish willfulness. *See McGinty*, 193 F.3d at 68.

Defendants contend first that the jury's finding of willfulness was inconsistent with its finding that defendants did not intentionally discriminate against plaintiffs under plaintiffs' disparate treatment theories. However, the questions of "intentional" and "willful" conduct presented different issues for the jury. "Intentional" conduct required evidence that defendants were motivated by plaintiffs' ages to select them for the IRIF. *See Cronin v. Aetna Life Insurance Co.*, 46 F.3d 196, 203 (2d Cir. 1995) "Willful" conduct required evidence that defendants showed reckless disregard for whether their conduct violated the ADEA. Thus, an

employer could act willfully by recklessly ignoring the impact an employment practice had on older employees but could act intentionally only if his employment decision was based at least in part on an employee's age. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 549, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-27, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985). Because the requirements for willful and intentional conduct differ, the jury's different findings on those two questions are not inconsistent and its finding of willfulness on the disparate impact theory was not error as a matter of law for that reason.

Defendants also argue that the evidence of defendants' willfulness was insufficient as a matter of law. First, defendants ask the Court to accept the testimony offered by KAPL officials denying willfulness. The credibility of that testimony presented a question of fact for the jury, not the Court. As noted above, the jury was entitled to reject the testimony by KAPL officials and to accept the evidence supporting a finding of willfulness. *See* note 22 *supra.* The evidence adduced at trial which supported a finding of willfulness included the following:

— KAPL officials and employees were aware that the ADEA prohibited employment practices which caused disparate impacts on older employees;

— Defendants were aware that the implementation of the guidelines for the IRIF would result in a disparate impact on older employees, in that thirty of the thirty-one employees selected for the IRIF were older employees, but took no meaningful steps to avoid or mitigate that impact;

— The guidelines for the IRIF dictated that KAPL perform a statistical assessment of the group of employees selected for termination of their employment to identify any disparate impact on older employees. Such an assessment was performed by a KAPL employee which compared the average age of the KAPL workforce of over 2,000 before the IRIF with its average age after the IRIF. In fact, as acknowledged by KAPL at trial and as was self-evident, this statistical assessment was incapable of identifying any disparate impact on older employees. Burek Tr. (Docket No. 146) at 260; Correa Tr. (Docket No. 150) at 26-32. The jury was entitled to conclude from this lone statistical assessment by KAPL prior to the IRIF that KAPL recklessly disregarded what should have been apparent from the fact that thirty of the thirty-one employees selected for the IRIF were older employees.

— At the same time that KAPL was proceeding to select thirty older employees out of a total of thirty-one for the IRIF, KAPL was proceeding to hire thirty-five new employees, virtually all of whom were younger employees. The jury was entitled to infer from this evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees.

There was, therefore, sufficient evidence for a reasonable jury to find that defendants KAPL and Lockheed Martin acted willfully in disregarding the disparate impact on older employees caused by the IRIF. Defendants' argument to the contrary must be rejected.

5. Liability Under the HRL

Defendants contend that they are entitled to judgment as a matter of law on plaintiffs' claim under the HRL. Defs. Mem. of Law at 25-26. The ADEA defines the protected class of older employees as those forty years of age or older. 29 U.S.C. § 631(a). The HRL defines the protected class as those over the age of eighteen. N.Y. Exec. Law § 296(3-a)(a). *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 461 (2d Cir.), *cert. denied*, 534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378 (2001). Defendants argue that plaintiffs offered no evidence of any disparate impact from the IRIF on employees over age eighteen.

This contention fails for two reasons. First, defendants raise this argument for the first time on this motion. Defendants did not seek summary judgment on this ground, did not include this ground in their motions in limine and failed to seek judgment as a matter of law on this ground at the close of the plaintiffs' case or at the close of all the evidence. Moreover, defendants failed to request a jury instruction to this effect, failed to object to the jury instruction linking plaintiffs' claims under the ADEA with those under the HRL,[23] and failed to object to a special verdict form which also linked the claims under the two statutes. Defendants' failure to object at any prior stage waived the objection they now assert. *See Tuttle v. Equifax Check*, 190 F.3d 9, 15-16

23. The jury was instructed to "consider the plaintiffs' claim under the state Human Rights Law . . . *identically* to your consideration of the plaintiffs' claims . . . under the Age Discrimination in Employment Act. . . ." Jury Charge at 14 (emphasis added).

(2d Cir. 1999); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d cir.1993) (holding that vessel owner waived objection to sufficiency of the evidence to support verdict for injured longshoreman by failing to renew its motion for directed verdict at close of all the evidence); *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir. 1992) ("Failure to object to a jury instruction or the form of an interrogatory prior to the jury retiring results in a waiver of that objection.").

Second, defendants' statement of the law appears incorrect. Several courts have noted the differences in the definitions of the protected classes under the ADEA and the HRL. *See, e.g.*, *Gonzalez*, 135 F. Supp. 2d at 400 n.11; *Hogan v. Metromail*, 107 F. Supp. 2d 459, 470-71 (S.D.N.Y. 2000); *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 Civ. 8494(HB), 1999 WL 944505, at * 4 n.4 (S.D.N.Y. Oct. 19, 1999), *aff'd*, 239 F.3d 456 (2d Cir.), *cert. denied*, 534 U.S. 993, 122 S. Ct. 460 (2001). As defendants acknowledge, however, research has revealed no cases addressing this issue. In the absence of any controlling decision to the contrary, guidance must be taken from the Second Circuit's statement in *Smith* that since, as here, "claims under the [HRL] are analyzed *identically* to claims under the ADEA and Title VII, the outcome of an employment discrimination claim made pursuant to the [HRL] is the same as it is under the ADEA and Title VII." *Smith*, 196 F.3d at 363 n.1 (emphasis added).

Accordingly, defendants' motion on this ground is denied.

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C. Damages

The jury awarded damages to the seventeen remaining prevailing plaintiffs in varying amounts for back pay, front pay and emotional distress, both past and future. Defendants move for a new trial or remittitur of the damages awarded to all remaining plaintiffs except James R. Quinn. Defs. Mem. of Law at 26- 72.

If a district court finds that damages awarded by a jury are excessive, it may grant a defendant's motion for a new trial in whole or limited to damages, or it may grant remittitur by conditioning denial of a defendant's motion for a new trial on a plaintiff's accepting damages in a reduced amount. *See Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93, 96 (2d Cir. 1995); *Tanzini v. Marine Midland Bank*, 978 F. Supp. 70, 77 (N.D.N.Y.1997) (McAvoy, J.). Remittitur is "the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2d Cir. 1990) (quoting *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir. 1984)). "It is not among the powers of the ... court ... simply to reduce the damages without offering the prevailing party the option of a new trial." *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 914-15 (2d Cir. 1997) (quoting *Tingley Sys., Inc.*, 49 F.3d at 96). A reduced award should represent "the maximum award that would not be excessive." *Ragona v. Wal-Mart Stores, Inc.*, 62 F. Supp. 2d 665, 668 (N.D.N.Y.1999) (McAvoy, J.), *aff'd*, 210 F.3d 355 (2d Cir. 2000).

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Awards of damages for back pay and front pay are authorized under both the ADEA and the HRL, but awards of damages for emotional distress are authorized only by the HRL. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 120-21 (2d Cir. 1984)(holding that "plaintiffs are not entitled to recovery for emotional distress in ADEA actions") (citing *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984)); *Young v. Bank of Boston Conn.*, No. 93 CV 1642(AVC), 1996 WL 756504, at *3 n.2 (D. Conn. June 18, 1996). The standard for review of damages awarded by a jury under a federal law such as the ADEA is the traditional common law standard whether the award "shocks the conscience." *See Consorti v. Armstrong World Indus., Inc.*, 103 F.3d 2, 4 (2d Cir. 1995); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189 (2d Cir. 1992).

The standard for review of damages awarded by a jury under a state law such as the HRL is defined by the applicable state law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 419-20, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996); *Fowler v. Industrial Tire Products, Inc.*, 2 Fed. Appx. 125, 2001 U.S. App. LEXIS 812, 2001 WL 51007, at *1 (2d Cir. 2001). The standard under New York law is set forth in N.Y. C.P.L.R. § 5501(c) (McKinney Supp.2001), which directs a court to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." The "deviates materially" standard under New York law is less deferential to the jury's verdict than is the "shocks the conscience" standard. *See Gasperini*, 518 U.S. at 424; *Gasperini v. Center for Humanities, Inc.*, 149 F.3d 137, 139 (2d Cir. 1998) (noting on appeal after remand that the New York standard is "more favorable to the party

challenging the award than is the federal 'shocks the conscience' review"). Thus, the jury's awards of damages for back pay and front pay under both the ADEA and the HRL and its awards of damages for emotional distress implicate different standards of review on defendants' motion here. In addition, defendants present different arguments under each element of damages.

1. Back Pay

"A plaintiff who has proven a discharge in violation of the ADEA is, as a general matter, entitled to back pay from the date of discharge until the date of judgment." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 167 (2d Cir. 1998); *accord*, *Banks v. Travelers Cos.*, 180 F.3d 358, 364 (2d Cir. 1999). With respect to the damages for back pay awarded by the jury, defendants contend that certain plaintiffs failed to mitigate such damages and, therefore, the awards of back pay to those plaintiffs was erroneous as a matter of law.

An employee discharged as the result of discrimination "has an obligation to attempt to mitigate her damages by using 'reasonable diligence in finding other suitable employment.'" *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 695 (2d Cir. 1998) (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 73 L. Ed. 2d 721, 102 S. Ct. 3057 (1982)). An employee's duty to mitigate is "not onerous" and does not require that an employee actually find other employment. *Id.*; *Dailey v. Societe Generale*, 108 F.3d 451, 456 (2d Cir. 1997). On this issue, a defendant bears the burden of proving "(1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." *Hawkins*, 163 F.3d at 695; *Dailey*, 108 F.3d at 456. In considering other employment, a discharged

employee "need not go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co.*, 458 U.S. at 231. However, an employer "is released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment." *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir. 1998). The "ultimate question" is whether a discharged employee "acted reasonably in attempting to gain other employment or in rejecting proffered employment." *Hawkins*, 163 F.3d at 695 (quoting *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 830 (2d Cir. 1992)).

2. Front Pay

The ADEA authorizes the district court to fashion equitable remedies "to ensure that victims of age discrimination are made whole." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984). The ADEA explicitly authorizes a court to require the reinstatement of a discharged employee. *See* 29 U.S.C. § 626(b). However, where reinstatement is not feasible, a district court may award an employee front pay. *Banks*, 180 F.3d at 364. Defendants here concede that reinstatement of all prevailing plaintiffs is impossible and impracticable. Defs. Mem. of Law at 63. Front pay may be awarded for future lost earnings to make "victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment." *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir. 1996) (quoting *Whittlesey*, 742 F.2d at 729). "While a jury determines back pay, the determination of any front

pay award is committed exclusively to the district court's equitable jurisdiction." *Banks*, 180 F.3d at 364; *Tanzini*, 978 F. Supp. at 80. However, a court may receive an advisory verdict from a jury on front pay. *See Hogan v. General Elec. Co.*, 144 F. Supp. 2d 138, 144 (N.D.N.Y.2001) (Hurd, J.); *Tanzini*, 978 F. Supp. at 80. Here, the jury returned advisory verdicts on front pay for plaintiffs which the Court adopted when it entered judgment on the jury's verdicts.

Defendants challenge the jury's awards of front pay on the grounds that there was insufficient evidence from which to find that the plaintiffs to whom front pay was awarded lacked reasonable prospects of obtaining comparable employment in the future and it required undue speculation to determine the amount of income such plaintiffs would have earned in the future if their employment had not been terminated. Defs. Mem. of Law at 63. Awards of front pay are necessarily peculiar to the facts of each case and, because such an award requires a degree of prediction, "always involve some degree of speculation. . . ." *Tanzini*, 978 F. Supp. at 81 (quoting *Tyler*, 958 F.2d at 1189). Nevertheless, there must exist sufficient evidence from which the factfinder may reasonably determine the likelihood that a discharged employee will find suitable employment in the future, the amount of income the employee may reasonably be expected to earn in the future, the amount of income the employee reasonably would have earned if his employment with the defendant had not been terminated, and the duration of such employment with the defendant. *See Padilla*, 92 F.3d at 124-26; *Whittlesey*, 742 F.2d at 728; *Tanzini*, 978 F. Supp. at 81.

3. Emotional Distress

Defendants contend that the jury's awards of damages for emotional distress under the HRL deviate materially from what would constitute reasonable compensation under New York law. In determining whether a jury's award of such damages was excessive under the New York standard, the reasonableness of a particular award must be determined by reference to verdicts in similar cases. *See Gasperini*, 518 U.S. at 424, 116 S. Ct. 2211. Damages for emotional distress may not be presumed and are not established simply by evidence of a defendant's discriminatory conduct. *See Tanzini*, 978 F. Supp. at 78. However, such damages may be established by the plaintiff's testimony alone. *See id.*

Where a plaintiff's emotional distress consisted of shock, sleepless nights, nightmares, moodiness, humiliation, upset and the like but the plaintiff did not require treatment,[24] the range of awards sustained by courts in similar cases appears to be from $5,000 to $125,000. *See, e.g., Shannon v. Fireman's Fund Ins. Co.*, 156 F. Supp. 2d 279, 296-98 (S.D.N.Y. 2001) (reducing award of $80,000 for emotional

24. Such evidence of emotional distress has frequently been referred to in cases as "garden variety" emotional distress. *See, e.g., Jessamy v. Ehren*, 153 F. Supp. 2d 398, 401 (S.D.N.Y. 2001); *Shannon v. Fireman's Fund Ins. Co.*, 156 F. Supp. 2d 279, 297 (S.D.N.Y. 2001); *Epstein v. Kalvin-Miller Int'l, Inc.*, 139 F. Supp. 2d 469, 479 (S.D.N.Y. 2001) ("[a] 'garden variety' emotional distress claim is one that did not require medical treatment"); *Ruhlmann v. Ulster County Dep't of Social Servs.*, 194 F.R.D. 445, 449 & n.6 (N.D.N.Y. 2000) (Hurd, J.); *Funk v. F & K Supply, Inc.*, 43 F. Supp. 2d 205, 227 (N.D.N.Y. 1999) (McAvoy, J.); *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 672 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997).

distress in age discrimination case to $40,000); *Epstein v. Kalvin-Miller Int'l, Inc.*, 139 F. Supp. 2d 469, 479-81 (S.D.N.Y. 2001) (upholding jury award of $54,000 for emotional distress for age discrimination and concluding that "some courts have remitted emotional distress awards to between $30,000 and $125,000 where the only evidence of emotional distress has been the plaintiff's testimony that he was distressed, even when no physical manifestations have been claimed"); *Fowler v. New York Transit Auth'y*, 2001 U.S. Dist. LEXIS 762, No. 96 Civ. 6796(JGK), 2001 WL 83228, at *10-15 (S.D.N.Y. Jan. 31, 2001) (reducing award of $50,000 for emotional distress for racial discrimination to $25,000); *Distefano v. Long Island R.R. Co.*, 1999 U.S. Dist. LEXIS 21640, No. 96 CV 5487, 1999 WL 1704784, at *5-7 (E.D.N.Y. Dec. 21, 1999) (reducing damages for emotional distress in age and gender discrimination case from $7,000,000 to $125,000); *Funk v. F & K Supply, Inc.*, 43 F. Supp. 2d 205, 226-29 (N.D.N.Y.1999) (McAvoy, J.) (reducing awards of $850,000 and $450,000 for emotional distress under the HRL in gender discrimination case to $30,000 each); *Courtney v. City of New York*, 20 F. Supp. 2d 655, 660-62 (S.D.N.Y. 1998) (finding that maximum award of damages for emotional distress in similar cases is $100,000); *Sanderson v. City of New York*, 1998 U.S. Dist. LEXIS 5737, No. 96-Civ. 3368(LLS), 1998 WL 187834, at *7-10 (S.D.N.Y. Apr. 21, 1998) (finding that awards upheld in similar cases did not exceed $100,000 and reducing jury's award to four plaintiffs in an age discrimination case from $150,000 for each plaintiff to between $10,000 and $100,000); *Tanzini*, 978 F. Supp. at 78-80 (collecting cases and finding applicable range in such cases to be from $5,000 to $30,000); *Allender v. Mercado*, 233 A.D.2d 153, 649 N.Y.S.2d 144 (1st Dep't

1996) (upholding award of $100,000 for mental anguish in an employment discrimination suit); *Boutique Indus., Inc. v. New York State Div. of Human Rights*, 228 A.D.2d 171, 643 N.Y.S.2d 986 (1st Dep't 1996) (reducing award of $150,000 to $100,000 in an age discrimination suit); *see also Shea v. Icelandair*, 925 F. Supp. 1014, 1019-30 (S.D.N.Y. 1996) (reducing jury's award for emotional distress in an age discrimination case from $250,000 to $175,000 and finding that "[t]he most important factor that sets this case apart from others involving emotional pain and suffering is the fact that [defendant's] discriminatory conduct had physical consequences").

What appears from a review of these cases is that courts have exhibited substantial disagreement over what constitutes reasonable compensation for emotional distress under the HRL where the evidence supporting a plaintiff's claim rests exclusively on testimony establishing shock, nightmares, sleeplessness, humiliation, moodiness and similar consequences but without significant physical manifestations or the need for treatment. However, those cases identify factors which affect the determination of the reasonableness of a jury's award, including the nature, severity and duration of such consequences. It further appears that where those consequences do not include physical manifestations or treatment by a medical care provider, the maximum award which does not deviate materially from awards in comparable cases is $125,000.

4. Individual Plaintiffs

Defendants' challenges to the damages awarded to the individual plaintiffs require separate consideration of the evidence presented as to each plaintiff.

Appendix B

a. Raymond E. Adams

Defendants contend that the jury's award of a total of $294,795.60 to plaintiff Raymond E. Adams ("Adams") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 50-52.

Adams was forty-eight at the time of the IRIF. He held the position of Team Coordinator at that time with an annual salary of approximately $49,600. He had been employed by KAPL or its parent company for approximately thirty years. Adams has held two positions with other employers since the IRIF at comparable salaries and is presently employed as a project manager at a manufacturing company. The evidence of Adams' emotional distress consisted of Adams' testimony that he was shocked and devastated by the IRIF, he suffered stress at the loss of his job as he was the sole support for his family, he suffered sleeplessness for months, he was lethargic, he felt small and inadequate, and he has worried constantly since the IRIF about having his employment terminated again. Adams Tr. (Docket No. 180) at 237-89.

The evidence supporting Adams' claim for emotional distress consisted exclusively of shock, sleeplessness, upset and similar consequences but involved no physical manifestations and required no treatment. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Adams' damages for emotional distress is granted unless Adams files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

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b. Wallace Arnold

The jury awarded plaintiff Wallace Arnold ("Arnold") back pay in the amount of $172, 899.95 and damages for emotional distress totaling $118,778.41. Defendants contend that Arnold's back pay award should be reduced for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 42-43, 72. Defendants do not challenge the front pay awarded to Arnold.

Arnold was forty-one at the time of the IRIF. Arnold held a doctorate in Environmental Engineering and was employed as a Chemical Waste Engineer at the time of the IRIF earning approximately $44,000 annually. Arnold had been employed by KAPL since 1984, he was married and had two teenage children. Following the IRIF, Arnold accepted a contract research position at Pennsylvania State University in State College, Pennsylvania which paid approximately $27,000 annually. The contract for that position ended in June 1997 and was not renewed. Arnold and his family then returned to the Albany area where he held positions as a truck driver, bank teller, laundromat worker and gas station attendant and pursued courses to obtain a certificate to teach high school chemistry. Arnold Tr. (Docket Nos. 168, 169).

Defendants argue that while employed at Penn State, Arnold failed to mitigate his damages by seeking comparable employment even though he was aware that the contract for his employment there would end in or about June 1997. However, Arnold testified that he accepted this position in the hope that it would serve as an entry to a teaching position. The jury was entitled to credit this testimony, to find that

Arnold's efforts in this period pursuing a teaching position constituted reasonable efforts to obtain comparable employment and to conclude that defendants had failed to meet their burden of proof on this issue. *See Padilla*, 92 F.3d at 125-26. Accordingly, the record sufficiently supported the jury's award of back pay to Arnold, and that award was not substantially erroneous or a miscarriage of justice. Defendants' motion for a new trial on this issue is denied.

The evidence supporting Arnold's claim of emotional distress derived solely from Arnold's testimony. Arnold testified that in the aftermath of the IRIF, he was shocked, devastated and humiliated. He lost twenty to thirty pounds and was unable to sleep for months. Arnold testified that he felt severe shame and humiliation at the loss of his position at KAPL and at the series of jobs he held following the IRIF to support his family, feelings which persisted to the time of trial. Finally, Arnold testified that the IRIF and its aftermath was a significant contributing factor in his wife's decision to separate from him. Arnold Tr. (Docket No. 168) at 1098-1155. Although there was no evidence that Arnold ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Arnold's damages for emotional distress is denied.

c. Deborah L. Bush

The jury awarded plaintiff Deborah Bush ("Bush") back pay in the amount of $32,152.97, front pay in the amount of $70,625.15, and damages for emotional distress totaling $111,578.41. Defendants contend that they are entitled to a new trial or remittitur on all such awards. Defs. Mem. of Law at 47-49, 65- 66.

Bush was forty-one at the time of the IRIF and was the single mother of an eight year old son. She had received a degree in secretarial science and was employed as an administrative specialist at the time of the IRIF earning an annual salary of approximately $35,000. She had been employed by KAPL for twenty-two years. Six months after the IRIF, Bush found a position as a secretary at another company paying approximately $25,000 annually. She accepted a position as a secretary at another company in February 1998 where she remained at the time of trial earning approximately $32,000 annually. Bush Tr. (Docket No. 179).

Defendants challenge the jury's back pay award to Bush on the ground that she failed to satisfy her duty to mitigate damages when she moved to a new position at a lower salary and by failing to continue to seek employment comparable to her position at KAPL. In February 1998, Bush was earning approximately $27,500 annually when she accepted a position at another company which paid approximately $26,000 annually. Bush testified that she accepted the lower paying position because her opportunities for promotion were greater at the second company. In fact, her annual salary there had risen to almost $32,000 by the time of trial. Bush also testified

that she had continued to seek employment comparable to her administrative position at KAPL: by checking advertisements but had found nothing to pursue.[25] Whether Bush's testimony was credible and her efforts to find comparable employment reasonable were questions for the jury. On this record the jury was entitled to find that defendants had not satisfied their burden of proving that Bush failed to mitigate her damages in either respect. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion for a new trial on the issue of the jury's award of back pay to Bush is denied.

Defendants challenge the front pay award to Bush on the grounds that Bush failed to establish the absence of any prospect of obtaining comparable employment and that the duration of the front pay award was unduly speculative. The evidence at trial established that Bush's only post-high school education was for a position as a secretary, the only position she was offered after the IRIF, including from defendants, was as a secretary, and that Bush had continued to check newspaper advertisements for employment comparable to her position at KAPL but had found none. From this record, there was sufficient evidence to conclude that Bush had no reasonable prospect of obtaining a position comparable to her administrative position at KAPL in the foreseeable future.

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25. Bush testified that in the Summer of 1996, KAPL itself considered her application for re-employment there but only for a secretarial position paying approximately $27,000 annually. Bush Tr. at 18-19.

Bush was awarded front pay as compensation for a period of ten years. Special Verdict (Docket No. 126) at 1. Given Bush's age and the absence of prospects for comparable employment, it was reasonable to conclude that front pay for a period of ten years was "necessary to provide whole relief for [a] victim[ ] of employment discrimination." *Padilla*, 92 F.3d at 126 (upholding front pay intended to provide compensation over a period of twenty years).[26] This conclusion was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of front pay for Bush is denied.

Finally, defendants contend that the jury's award of damages to Bush for emotional distress was excessive and remittitur to $10,000 should be granted. Bush herself presented the only evidence supporting her claim of emotional distress. She testified that following the IRIF, she was upset, ashamed and humiliated. She also experienced headaches, sleeplessness, stomach upset and weight gain. Bush further testified that while these symptoms abated after several months, the headaches and stomach distress continued

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26. Front pay was awarded to only seven of the eighteen plaintiffs here and the duration of each varied as follows: 1.25 years (Arnold), two years (Reynheer), nine years (Palmatier), 9.75 years (Adams), ten years (Bush), twelve years (Townsend) and 12.5 years (Woodman). Special Verdicts (Docket Nos. 119, 124, 126, 128). Thus, it appears that in rendering its advisory verdicts on front pay, the jury followed its instruction that "[t]he claim for damages of each plaintiff, and the evidence related to that claim, must be considered and weighed by you on its own merits. Whether you award damages to one plaintiff, or the amount of any such damages, has no bearing on any other plaintiff's claim for damages." *See, e.g.*, Jury Charge (Docket No. 127) at 11-12.

at reduced frequencies to the time of trial. Bush Tr. at 8-24. Although there was no evidence that Bush ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Bush's damages for emotional distress is also denied.

d. William R. Chabot

Defendants contend that the jury's award of a total of $119,734.85 to plaintiff William R. Chabot ("Chabot") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 40-42.

Chabot was fifty-seven at the time of the IRIF. He was a computer specialist at that time with an annual salary of approximately $50,000. He had been employed by KAPL for thirty-six years. Chabot was unable to find other suitable employment and began collecting his pension from KAPL in February 1996. The evidence of Chabot's emotional distress consisted of the testimony of Chabot and his wife that he was shocked, embarrassed and humiliated by the IRIF, he has suffered sleeplessness since the IRIF, he was ashamed and withdrew from interaction with his sons and others, and he became indecisive and was argumentative with his family. Chabot Tr. (Docket No. 173) at 139-53, 180- 81. Although there was no evidence that Chabot ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other

similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Chabot's damages for emotional distress is denied.

e. Allen E. Cromer

Defendants contend that the jury's award of a total of $74,734.85 to plaintiff Allen E. Cromer ("Cromer") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 52-53. Defendants do not challenge the award to Cromer of $17,326.06 for back pay.

Cromer was forty-two at the time of the IRIF. He was a specialist performing inspections at that time earning an annual salary of approximately $43,000. He had been employed by KAPL for fifteen years. Cromer was re-employed by KAPL in September 1996 in a janitorial position and was promoted up to an inspector position in July 1997 at an annual salary of approximately $38,000. Cromer Tr. (Docket No. 173) at 218-24. Cromer subsequently was promoted to another position in the same field, comparable but inferior to his position at the time of the IRIF, at an annual salary of approximately $42,000 which he held at the time of trial. *Id.* at 225-26.

The evidence of Cromer's emotional distress consisted solely of the testimony of Cromer that he was scared and frightened when he receive notice of the IRIF, he has suffered sleeplessness since receiving that notice, he suffered chest pains due to the stress of the IRIF and received medical care for both the sleeplessness and the chest pains, he withdrew socially, and he was humiliated and embarrassed. Moreover,

Cromer testified that during his ten months as a janitor, he was deeply humiliated to be seen by his former co-workers performing what he believed were menial tasks and was occasionally called derisive names by former co-workers. Cromer Tr. at 195-99, 215-31, 249-50. Based on this and other testimony, the jury's award does not deviate materially from the maximum compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Cromer's damages for emotional distress is denied.

f. Thedrick L. Eighmie

The jury awarded plaintiff Thedrick L. Eighmie ("Eighmie") back pay in the amount of $25,585.00 and damages for emotional distress totaling $40, 275.00. Defendants contend that Eighmie's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 55-56, 71-72.

Eighmie was fifty-three at the time of the IRIF. Eighmie held a master's degree in Ceramic Engineering and was employed as an engineer at the time of the IRIF earning approximately $54,000 annually. Eighmie had been employed by KAPL since 1979, he was married and had three children, two were in college and one in high school. Following the IRIF, Eighmie found no other employment. He started a financial consulting business, but that business had few clients and Eighmie earned less than $11,000 total in the four years following the IRIF. Eighmie Tr. (Docket No. 187) at 343-73.

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Defendants argue that as a matter of law, Eighmie took insufficient steps to satisfy his duty to mitigate damages by finding comparable employment and, therefore, defendants are entitled to judgment at a matter of law or to a new trial on the issue of the jury's award of back pay to Eighmie. However, Eighmie testified that following the IRIF, he prepared a new resume, checked for job listings in local newspapers and at KAPL, and the Department of Labor, attended seminars on interview techniques, provided a copy of his resume to a job placement agency, went on one job interview, contacted a KAPL representative concerning the availability of a position in addition to making efforts to start his financial consulting business. Eighmie Tr. at 355-73. While defendants elicited other evidence of steps Eighmie could have taken to obtain other employment, the questions of the credibility of Eighmie's testimony and the reasonableness of Eighmie's efforts were issues of fact for determination by the jury. Crediting Eighmie's testimony, there was sufficient evidence to support the jury's finding that defendants failed to sustain their burden of proving that Eighmie failed to mitigate his damages. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion on this ground is denied.

The evidence of Eighmie's emotional distress consisted solely of Eighmie's testimony that he was angry and felt betrayed when the IRIF was announced, feelings which had continued to the time of trial. As the sole support for his family and with three college-age children, Eighmie felt like a failure and worried about how he would support his family in the future. Eighmie and his wife were forced by financial constraints to cancel a twenty-fifth wedding anniversary

cruise that they had planned with friends. Eighmie suffered sleeplessness following the IRIF which continued to the time of trial. Eighmie Tr. at 343-52, 363. Eighmie never sought treatment for any consequences he experienced from the IRIF. From this testimony, the jury's award does not deviate materially from the maximum compensation of $125, 000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Eighmie's damages for emotional distress or for remittitur is denied.

g. Paul M. Gundersen

Defendants contend that the jury's award of a total of $130,578.41 to plaintiff Paul M. Gundersen ("Gundersen") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 60-62. Defendants do not challenge the award to Gundersen of $14,820.15 for back pay.

Gundersen was forty-six at the time of the IRIF. He was a mechanical specialist at that time with an annual salary of approximately $44,000. He had been employed by KAPL or its parent company for twenty-eight years. Gundersen is married and the father of two adult children. Following the IRIF, Gundersen found and maintained other employment at a salary slightly reduced from that at KAPL. Gundersen Tr. (Docket No. 182) at 328-40.

The evidence of Gundersen's emotional distress consisted of the testimony of Gundersen and his wife that he was initially humiliated when he broke down crying at the staff meeting announcing those selected for the IRIF. He has experienced sleeplessness and nightmares continuously since

the IRIF, and he has lost interest in many things. Gundersen further testified that he had been diagnosed with depression eight months prior to the IRIF for which he was prescribed an antidepressant. Gundersen testified that his depression was exacerbated by the IRIF, an effect which continued to the time of trial, and that the dosage of his medication was doubled as a result of the IRIF and remained so to the time of trial. Moreover, Gundersen and his wife testified that following the IRIF and as a consequence thereof, Gundersen had gained approximately one hundred pounds by the time of trial. Gundersen Tr. at 328- 40, 456-57.

The testimony of Gundersen and his wife established not only the emotional consequences similar in kind to that suffered by other plaintiffs—humiliation, shock, sleeplessness, nightmares, reduced self-esteem and the like—but also physical and mental manifestations of emotional distress. In particular, that testimony established that Gundersen experienced a substantial weight gain and that his pre-existing depression was made worse by the IRIF, both of which had persisted in the five years since the IRIF. Thus, the jury's award to Gundersen for emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases. *See, e.g. Shea*, 925 F. Supp. at 1019-30. Accordingly, defendants' motion for a new trial or remittitur on the issue of the jury's award of damages to Gundersen for emotional distress is denied.

h. Clifford J. Levendusky

The jury awarded plaintiff Clifford J. Levendusky ("Levendusky") back pay in the amount of $21,461.17 and

damages for emotional distress totaling $147,683.21. Defendants contend that Levendusky's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 46-47, 68-69.

Levendusky was fifty-four at the time of the IRIF. He was employed as an engineering specialist earning approximately $52,000 annually. Levendusky had been employed by KAPL or its parent company for over thirty years, he was married and had two sons, one in college and the other recently graduated from college. On March 4, 1996, Levendusky was rehired by KAPL as a plumber/steamfitter at an hourly rate at which he earned an average of $42,500 annually over the next four years. Levendusky Tr. (Docket No. 173) at 274- 98.

Defendants argue that because Levendusky failed to seek other employment either inside or outside KAPL after his return to KAPL, he failed to satisfy his obligation to mitigate damages and, therefore, was not entitled to an award for back pay. However, Levendusky testified that immediately following the IRIF, he had contacted the KAPL Human Resources Manager about the possibility of being rehired by KAPL in his former position but was told by the manager that "It's out of the question." Levendusky Tr. at 286-87. Levendusky further testified that after his return to KAPL, he checked the listings of job openings within KAPL but saw no listing for a position comparable to his former position for which he might be qualified. *Id.* at 294- 95. The jury was entitled to find from Levendusky's re-employment, the KAPL manager's discouragement of Levendusky's efforts within

KAPL and the results of Levendusky's checks of the KAPL internal job listings that defendants had failed to meet their burden of proving that Levendusky failed to mitigate his damages and that Levendusky's efforts in these circumstances were reasonable. This finding was neither substantially erroneous nor a miscarriage of justice. Defendants motion on this ground is denied.

The evidence of Levendusky's emotional distress consisted solely of Levendusky's testimony that he was shocked when told that he had been selected for the IRIF. His shock was exacerbated because at an awards banquet two months before the IRIF at which Levendusky received an award for his years of service, defendant I eh had shaken his hand and told him not to worry ab it the IRIF. Levendusky Tr. at 282-83. Levendusky also testified that he was upset and embarrassed to tell his family that he had lost his job, he was forced to accept a demotion to the plumber/ steamfitter position to support himself and his family, and his new job was made more difficult because his new co-workers refused to speak to him for the first three years of his return because he was returning to a union position after twenty-three years as a salaried employee. Levendusky Tr. at 274-93. Levendusky never sought treatment for any consequences he experienced from the IRIF. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Levendusky's damages for emotional distress is granted unless Levendusky files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

Appendix B

i. Clifford B. Meacham

Defendants contend that the jury's award of a total of $125,000.00 to plaintiff Clifford B. Meacham ("Meacham") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 37-40.

Meacham was sixty at the time of the IRIF. He received a master's degree in Computer Science and was earning approximately $63,000 annually at the time of the IRIF. He had been employed by KAPL or its parent company for over forty-three years and planned to work until age sixty-five. Following the IRIF, Meacham found employment at another company for approximately one year at an annual salary of approximately $53,000. That employment ended in November 1997 and Meacham then moved to Florida where he has remained, supporting himself at several temporary positions and receiving his pension. Meacham Tr. (Docket No. 164) at 63-112.

The evidence of Meacham's emotional distress consisted of the testimony of Meacham and his treating psychologist that Meacham was initially dazed and bewildered after the IRIF was announced. Meacham lost self-confidence and endured the stress of uncertainty following the loss of his job. He suffered a recurrence of chronic pain in his back, neck and shoulders which he attributed to the stress from the IRIF. Meacham also suffered symptoms of depression. Meacham sought treatment from a psychologist for problems resulting from the IRIF as well as for other unrelated and preexisting issues. These consequences of the IRIF and Meacham's treatment with the psychologist were generally

resolved within one to two years. Meacham Tr. at 65-66, 110-12; Nydegger Tr. (Docket No. 165).

The jury was entitled to credit the testimony of Meacham and his treating psychologist. That testimony established the emotional consequences, physical manifestations of emotional distress and medical care for that distress. On this evidence, the jury's award of $125,000.00 to Meacham for his emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of the jury's award of damages to Meacham for emotional distress or for remittitur is denied.

j. Bruce E. Palmatier

The jury awarded plaintiff Bruce E. Palmatier ("Palmatier") back pay in the amount of $2,841.28, front pay in the amount of $13,211.05.15, and damages for emotional distress totaling $313,232.48. Defendants contend that they are entitled to a new trial or remittitur on all such awards. Defs. Mem. of Law at 43-45, 69-70.

Palmatier was forty-nine at the time of the IRIF and was married with four children ranging in age from seven to twelve. He was employed as an electrical specialist at the time of the IRIF earning an annual salary of approximately $43,000. Palmatier had been employed by KAPL or its parent company for thirty years. Six months after the IRIF, Palmatier was rehired by KAPL as an electrician at an hourly rate of pay, a position in which he continued through the time of trial. By working substantial overtime, Palmatier earned an

approximate annual income of $44,700 in the four years following the IRIF. Palmatier Tr. (Docket No. 186) at 190-228.

Defendants challenge the jury's back pay award to Palmatier on the ground that he failed to satisfy his duty to mitigate damages by failing to seek comparable employment after returning to KAPL as an electrician. Defendants argue that Palmatier's duty to mitigate damages required him to seek an exempt position rather that choosing to remain in the hourly position as Palmatier chose to reduce the likelihood that he would be selected for another IRIF. Palmatier Tr. at 230-32. First, the jury was entitled to find that the income Palmatier earned as an electrician following the IRIF was comparable, if not identical, to that which he had received as an exempt electrical specialist. Second, the reasonableness of Palmatier's decision not to pursue another exempt position for fear of another IRIF was a question for the jury. For either reason, the jury's finding that defendants failed to meet their burden of proving that Palmatier did not sufficiently mitigate his damages was supported by the evidence in the record. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion on this ground is denied.

Defendants challenge the front pay award to Palmatier on the ground that Palmatier failed to establish the absence of any prospect of obtaining comparable employment. The evidence at trial established that Palmatier, a high school graduate with college credits but no college degree, obtained a position as an electrician which was a demotion from his previous position as a specialist but comparable and, with

overtime, allowed Palmatier to earn comparable pay. Whether other comparable positions existed and, if so, whether such prospects were reasonable presented questions of fact. The determination on this record either that Palmatier had already obtained comparable employment or that he had no reasonable prospect of obtaining a position more comparable to his electrical specialist position at KAPL in the foreseeable future was adequately supported by the evidence. That determination was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial or remittitur on the issue of the award of front pay to Palmatier is denied.

Finally, defendants contend that the jury's award of damages to Palmatier for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Palmatier and his wife presented the only evidence supporting his claim of emotional distress. They testified that following the IRIF, Palmatier began experiencing sleeplessness and anxiety. His personality changed significantly, including increased irritability, lack of "drive," an inability to finish projects and a diminished ability to communicate with his children leading to a deterioration of their family life. Palmatier also experienced a weight gain. Palmatier Tr. (Docket No. 186) at 194-95; Palmatier Tr. (Docket No. 187) at 295-96. These consequences had persisted through the time of trial and showed no signs of abating. *Id.* at 296.

Palmatier further testified that in order to earn income comparable to his income prior to the IRIF, he worked substantial overtime and planned to continue doing so for

the foreseeable future. Palmatier Tr. at 222-25. This causes additional stress for Palmatier. As a result, Palmatier consulted his treating physician who in August 2000 prescribed Prozac, an antidepressant. Palmatier was continuing to take Prozac at the time of trial to assist in dealing with the stress. *Id.* at 226-27.

The testimony of Palmatier and his wife adduced evidence from which the jury could conclude that the consequences of the IRIF for Palmatier had included severe stress, personality changes and the treatment which had continued for the five years since the IRIF and would continue into the foreseeable future. Given this testimony establishing the nature, severity and duration of the consequences of the IRIF, the jury could reasonably award Palmatier substantial damages for emotional distress. However, its award of $313,242.38 deviates materially from the maximum compensation of $175,000 found reasonable in other similar cases involving consequences such as the jury could find were present here. *See*, *e.g.*, *Shea*, 925 F. Supp. at 1019-30. Accordingly, defendants' motion for a new trial on the issue of Palmatier's damages for emotional distress is granted unless Palmatier files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $175,000 on or before March 8, 2002.

k. Neil R. Pareene

The jury awarded plaintiff Neil R. Pareene ("Pareene") back pay in the amount of $63,050.37 and damages for emotional distress totaling $157,683.21. Defendants contend

that they are entitled to a new trial or remittitur on both awards. Defs. Mem. of Law at 49-50, 67-68.

Pareene was forty-five at the time of the IRIF and was married with children. He was employed as a specialist in the position of Craft Production Supervisor at the time of the IRIF earning an annual salary of approximately $48,000. Pareene had been employed by KAPL or its parent company for over twenty-six years. Following the IRIF, Pareene, a high school graduate, enrolled as a student at Schenectady County Community College pursuing an associate's degree in electrical technology and attended college full-time for the Spring and Fall semesters of 1996. Pareene also obtained a truck driver's license and worked as a truck driver for two different companies from May 1996 to August 1998 at hourly rates ranging from $10.00 to $12.39. Pareene was rehired by KAPL as a janitor in August 1998 at an hourly rate of approximately $17.00. In September 1999, Pareene was promoted to an hourly position as a systems operator at an hourly rate of $20.30. In the four years following the IRIF, Pareene earned an average annual salary of approximately $34,000. Pareene Tr. (Docket No. 174) at 360-408, 487-503.

Defendants challenge the jury's back pay award to Pareene on the ground that he failed to satisfy his duty to mitigate damages in two ways. First, defendants argue that Pareene's full-time attendance at college in the year following the IRIF breached his duty to mitigate damages. However, as the Second Circuit has stated:

> [T]here is no per se rule that finds inherently incompatible the duty of a ... plaintiff to use

> reasonable diligence in securing comparable employment and such a plaintiff's decision to attend school on a full-time basis. Rather, the central question a court must consider when deciding whether a student-claimant has mitigated her damages is "whether an individual's furtherance of his education is inconsistent with his responsibility 'to use reasonable diligence in finding other suitable employment.' " We believe that a fact-finder may, under certain circumstances, conclude that "one who chooses to attend school only when diligent efforts to find work prove fruitless" satisfies his or her duty to mitigate.

Dailey, 108 F.3d at 456-57 (citations omitted); *see also Smith v. American Serv. Co.*, 796 F.2d 1430, 1432 (11th Cir. 1986) (holding that the decision to attend school full-time was "entirely reasonable" where a job search was futile and the claimant held a part-time job while in school). Thus, Pareene's decision to attend school presented a question of reasonableness for determination by the jury in light of the circumstances which he then faced. Those circumstances included efforts by Pareene to seek other employment before enrolling as a full-time student and his obtaining employment while he attended school. Thus, it cannot be said that defendants satisfied their burden of proving Pareene's failure to mitigate in this regard.

Second, defendants argue that in the Spring of 1999, Pareene declined to accept an offer of a promotion to a position more comparable to his position prior to the IRIF.

However, Pareene declined the offer because it would require him to work a day shift rather than the preferred night shift to which he was then assigned. The jury was entitled to consider whether the change in shifts made the offered potion unsuitable or not comparable to Pareene's position before the IRIF. Moreover, since this offer was not made until over three years after the IRIF, the jury could at most reduce rather than deny back pay to Pareene on this ground. Thus, the offer to and declination by Pareene of this position presented a question of fact for resolution by the jury. The jury's resolution of this question was not substantially erroneous or a miscarriage of justice. Defendants' motion for a new trial on the issue of the award of back pay to Pareene is denied.

Defendants also contend that the jury's award of damages to Pareene for emotional distress was excessive and remittitur to $10,000 should be granted. Pareene presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he was shocked, angry, confused, frustrated, pained and more prone to crying. Pareene Tr. at 370-72, 502. Being told by defendants that his skills were neither critical nor flexible led him to enroll as a full-time student to improve his skills in those areas. *Id.* at 388-90. He aspired to return to a position at KAPL as satisfying as his position at the time of the IRIF but was told upon his re-employment there that he "could never hope to go back" to his former position. *Id.* at 402. Pareene testified that he has felt a constant strain since the IRIF and that the experience was traumatic. *Id.* at 500. He has felt a constant pressure to avoid mistakes that could lead to another IRIF. *Id.* at 501. The increased overtime he is required to work in

his present position also place an additional strain on him. *Id.* at 496.

Pareene's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF. However, that distress did not include significant physical manifestations or require treatment. Thus, the jury's award of $157,683.21 deviates materially from the maximum compensation of $125,000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Pareene's damages for emotional distress is granted unless Pareene files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

l. William C. Reynheer

The jury awarded plaintiff William C. Reynheer ("Reynheer") damages for back pay, front pay and emotional distress totaling $935,617.41. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 34-37, 63-65.

Reynheer was fifty-six at the time of the IRIF and was married with two adult children. He had received a bachelor's degree in engineering and was employed as an engineer at the time of the IRIF earning an annual salary of approximately $65,400. Reynheer had been employed by KAPL or its parent company for over twenty-six years. Following the IRIF, Reynheer sought unsuccessfully to obtain an engineering position. He then received training to become a truck driver

and unsuccessfully sought a position as a truck driver after obtaining a license. In response to a newspaper advertisement, Reynheer then obtained a position as an automobile salesman in September 1996, earning approximately $1,000 monthly. Reynheer was rehired by KAPL as a janitor on November 8, 1996 at an approximate annual income of $30,000. In November 1997, Reynheer was promoted to a position as a technician at an approximate annual income of $35,000. In the four years following the IRIF, Reynheer earned an average annual income of approximately $40,000. Reynheer Tr. (Docket No. 167) at 758-879.

Defendants challenge the jury's back pay award of $179,740.17 to Reynheer on the ground that he failed to satisfy his duty to mitigate damages when he failed to seek other engineering positions after his re-employment by KAPL in November 1996. Reynheer testified at length about his unsuccessful efforts to seek comparable employment prior to his re-employment at KAPL and about his efforts to obtain better positions within KAPL after his return. Whether Reynheer's testimony was credible and his efforts to find comparable employment reasonable were questions for the jury. On this record the jury was entitled to find that defendants had not satisfied their burden of proving that Reynheer failed to mitigate his damages. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion for a new trial on the issue of the jury's award of back pay to Reynheer is denied.

Defendants challenge the front pay award to Reynheer of $102,380.00 on the grounds that Reynheer failed to establish the absence of any prospect of obtaining comparable

employment. The evidence at trial established that Reynheer made diligent efforts for the first year after the IRIF to find employment as an engineer without success and that he made efforts to find employment as an engineer within KAPL after his re-employment there. From Reynheer's diligent but unsuccessful efforts prior to trial, the jury was entitled to find that there were no reasonable prospects for Reynheer to obtain a position as an engineer in the future. Defendants' motion on this ground is denied.

Finally, defendants contend that the jury's award of damages of $653,497.24 to Reynheer for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Reynheer presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he felt as he had on the occasions when he learned his parents had died. Reynheer Tr. at 758. Reynheer became depressed and "vegetative." *Id.* at 761. A pre-existing condition of high blood pressure was exacerbated and required an adjustment in his medication. *Id.* at 762. He experienced sleeplessness and his drinking increased. He became irritable and withdrew from family and friends. He ceased exercising as he had before the IRIF. *Id.* at 761-62, 774-75. Reynheer further testified, however, that these consequences largely disappeared by the end of 1996 when he returned to work at KAPL although he has continued to suffer episodes of depression less than once a month related to the IRIF. *Id.* at 763-75. Reynheer never sought treatment for any of these consequences. Reynheer also testified that he felt acute humiliation after returning to KAPL as a janitor and for the year he remained in that position. He would

regularly see his former co-workers as he performed his duties, but they avoided contact with him. *Id.* at 841-42.

Reynheer's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF. However, that distress did not include significant physical manifestations or require treatment. In these circumstances, the jury's award of $653,497.24 deviates materially from the maximum compensation of $125,000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Reynheer's damages for emotional distress is granted unless Reynheer files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

m. John K. Stannard

The jury awarded plaintiff John K. Stannard ("Stannard") back pay in the amount of $58,242.97 and damages for emotional distress totaling $140,803.46. Defendants contend that Stannard's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 57-60, 66-67.

Stannard was forty-seven at the time of the IRIF and was married with one son then in his second year of college. Stannard was employed as a maintenance engineering specialist at the time of the IRIF earning approximately $49,000 annually. Stannard had been employed by KAPL for over twenty-seven years. On February 2, 1996, Stannard was

rehired by KAPL as a janitor at an hourly rate at which he earned an average of $35,300 annually over the next four years. Stannard Tr. (Docket No. 186) at 25-66.

Defendants argue that because Stannard failed to seek other employment either inside or outside KAPL after his return to KAPL, he failed to satisfy his obligation to mitigate damages and, therefore, was not entitled to an award for back pay. However, Stannard, who has an associate's degree, testified that he searched for other comparable employment immediately following the IRIF before applying for and accepting the position at KAPL. Stannard Tr. at 42-43. Stannard further testified that since his return to KAPL, he has continued to check the listings of job openings within KAPL as well as in local newspaper and on the Internet but has seen no listings for a position comparable to his former position for which he might be qualified. *Id.* at 55-57. The jury was entitled to find from Stannard's re-employment and the results of Stannard's search for other positions that defendants had failed to meet their burden of proving that Stannard failed to mitigate his damages and that Stannard's efforts in these circumstances were reasonable. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants motion on this ground is denied.

The evidence of Stannard's emotional distress consisted solely of Stannard's testimony that he felt betrayed, devastated and angry when told that he had been selected for the IRIF. Stannard experienced sleeplessness and weight loss following the IRIF and felt run down. Stannard Tr. at 25-29. The stress of the IRIF also caused high blood pressure, an aggravation of a pre-existing back problem, a sinus infection and dental problems. *Id.* at 29-30. Stannard also experienced

trigeminal neuralgia.[27] These problems persisted in diminished degree to the time of trial. *Id.* at 35. The uncertainty caused by the IRIF caused Stannard's son to withdraw from college. *Id.* at 62-66. In these circumstances and given the physical manifestations experienced by Stannard, the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $175,000. *See Shea*, 925 F. Supp. at 1019-30. Therefore, because the award to Stannard does not exceed that figure, defendants' motion for a new trial or remittitur on the issue of Stannard's damages for emotional distress is denied.

n. Allen G. Sweet

Defendants contend that the jury's award of a total of $128,953.46 to plaintiff Allen G. Sweet ("Sweet") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 53-55.

Sweet was sixty-three at the time of the IRIF. He was a specialist at that time with an annual salary of approximately $50,000. He had been employed by KAPL or its parent company for over thirty years. Sweet was married and had received a high school equivalency degree. Following the IRIF, Sweet was unable to find other suitable employment and began collecting his pension from KAPL. Sweet Tr. (Docket Nos. 172, 173) at 21-44.

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27. A disorder of the nervous system causing "excruciating episodic [facial] pain in the area supplied by the trigeminal nerve." Dorland's Illustrated Medical Dictionary 1127 (28th ed.1994).

The evidence of Sweet's emotional distress consisted of the testimony of Sweet and his wife that he was shocked, embarrassed and humiliated by the IRIF, he has suffered sleeplessness since the IRIF, he lost approximately forty pounds, and he was ashamed and withdrew from friends, *Id.* at 27-30, 44, 114- 18. The sleeplessness and weight loss continued to the time of trial. *Id.* at 117-18. Sweet never required treatment for any consequences of the IRIF. On this record, the jury's award of $128,953.46 exceeded the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Sweet's damages for emotional distress is granted unless Sweet files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.[28]

o. David W. Townsend

Plaintiff David W. Townsend ("Townsend") was awarded damages for back pay, front pay and emotional distress totaling $379,356.09. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 56-57, 70-71.

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28. The jury's award deviates from what has been found herein to be the maximum reasonable compensation in other cases by less than $4,000, or approximately three percent. Little guidance is found as to whether such a deviation is "material" under the HRL. However, since the figure of $125,000 has been determined to be the *maximum* reasonable compensation in such circumstances, the deviation here is deemed material.

Appendix B

Townsend was forty-six at the time of the IRIF and was married with two school-age children. He had received an associate's degree and was employed as a specialist at the time of the IRIF earning an annual salary of approximately $40,500. Townsend had been employed by KAPL for over twenty-five years. In May 1996, Townsend obtained employment at another company as a laborer at an hourly rate of $14.50 and was later promoted to a position paying an hourly rate of $16.00. In October 1996, Townsend was rehired by KAPL as a janitor and was promoted in February 1998 to a position as irradiation technician where he has since remained at a current current annual income of $43,300. Townsend Tr. (Docket Nos. 1188, 189) at 583-646.

Defendants challenge the jury's back pay award of $18,126.82 on the ground that Townsend failed to satisfy his duty to mitigate damages when he failed to seek other comparable specialist positions after his promotion to the technician position at KAPL in February 1998. Defendants' argument fails for two reasons. First, while not identical in duties or pay to the specialist position, the technician position was sufficiently comparable in duties and pay to satisfy Townsend's duty to mitigate damages. For example, Townsend's annual salary at the time of the IRIF as a specialist was approximately $40,500 while his annual income in the technician position at the time of trial was approximately $43,300. Townsend Tr. at 580, 642. Second, defendants contend that Townsend's failure to mitigate commenced with his promotion to the technician position in February 1998 but do not appear to contend that his efforts for the two prior years were deficient. In these circumstances a question of fact was presented for resolution by the jury as

to what extent, if any, the back pay award to Townsend should be reduced for any such limited failure to mitigate. The jury's award here was supported by the evidence in the case. The award was not substantially erroneous or a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of the jury's award of back pay to Townsend is denied.

Defendants challenge the front pay award to Townsend of $25,121.50 on the ground that Townsend failed to establish the absence of any reasonable prospect of obtaining comparable employment. The evidence at trial established that Townsend made diligent efforts for two years after the IRIF to find employment comparable to the specialist position he held at the time of the IRIF without success and that the technician position he ultimately obtained at KAPL was sufficiently comparable, if not identical, to the specialist position to satisfy Townsend's burden of demonstrating the absence of reasonable prospects of obtaining more comparable employment. Townsend's education, age and unsuccessful efforts to obtain more comparable employment for over two years prior to February 1998 could also be considered. On this record, therefore, defendants' motion for a new trial on the issue of the award of front pay to Townsend must be denied.

Finally, defendants contend that the jury's award of damages of $336,107.77 to Townsend for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Townsend presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he was shocked, depressed, irritable and

"not able to function properly." Townsend Tr. at 584-89. Townsend stated that he suffered sleeplessness which has continued since the IRIF. *Id.* at 590. Townsend further testified that he began suffering acidic stomach pains following the IRIF which have continued to date and for which his doctor prescribed medication. *Id.* at 591-92. Townsend also testified that he experienced episodes of chest pains from the stress of the IRIF which caused him to seek treatment. *Id.* at 592-93. The manual labor position Townsend found immediately after the IRIF caused a hernia which required surgery. *Id.* at 618.

Townsend's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF which will continue in the future. It also established that this included significant physical consequences requiring treatment. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $175,000. *See, e.g. Shea*, 925 F. Supp. at 1019-30. Therefore, defendants' motion for a new trial on the issue of Townsend's damages for emotional distress is granted unless Townsend files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $175,000 on or before March 8, 2002.

p. Carl T. Woodman

Plaintiff Carl T. Woodman ("Woodman") was awarded damages for back pay, front pay and emotional distress totaling $398,188.70. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 45-46, 69.

Appendix B

Woodman was forty-five at the time of the IRIF and was married. He had received an associate's degree in business administration and was employed as a specialist in nondestructive testing at the time of the IRIF earning an annual salary of approximately $47,000. Woodman had been employed by KAPL or its parent company for over twenty-five years. In September 1996, Woodman was rehired by KAPL as a janitor at an hourly rate of $16.00. Woodman left that position for one as a field inspector at another company at an hourly rate of $17.00. Woodman's employment there was terminated in the Summer of 1998. He was then rehired by KAPL in November 1998 as a nondestructive tester, where he remains, at an hourly rate from which he received an approximate annual income of $49,000. Woodman Tr. (Docket Nos. 179, 180) at 60-141.

Defendants challenge the jury's back pay award of $33,920.18 to Woodman on the ground that he failed to satisfy his duty to mitigate damages by failing to seek other comparable specialist positions after his re-employment at KAPL in 1998. Defendants' argument fails for three reasons. First, while not identical in duties or pay to the specialist position Woodman held at the time of the IRIF, the jury could reasonably have found that the position as a tester was sufficiently comparable in duties and pay to satisfy Woodman's duty to mitigate damages. For example, Townsend's annual salary at the time of the IRIF as a specialist was approximately $47,000 while his annual income in the position as a tester at the time of trial was approximately $49,000. Woodman Tr. at 55, 140. Second, Woodman testified that he in fact made efforts to find other employment after November 1998. *Id.* at 136-39. The jury

could conclude from such testimony that Woodman in fact satisfied his duty to mitigate damages. Third, defendants contend that Woodman's failure to mitigate commenced with his re-employment at KAPL in November 1998 but do not appear to contend that his efforts for the nearly three prior years were deficient. In these circumstances a question of fact was presented for resolution by the jury as to what extent, if any, the back pay award to Woodman should be reduced for any such limited failure to mitigate. The jury's award here is supported by the evidence in the case. That award was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of the jury's award of back pay to Woodman is denied.

Defendants challenge the front pay award to Woodman of $42,344.21 on the ground that Woodman failed to establish the absence of any reasonable prospect of obtaining comparable employment. The evidence at trial established that Woodman made diligent efforts for the five years after the IRIF to find employment comparable to the specialist position he held at the time of the IRIF without success and that the position of tester he ultimately obtained at KAPL was sufficiently comparable, if not identical, to the specialist position to satisfy Woodman's burden of demonstrating the absence of reasonable prospects of obtaining more comparable employment. Woodman's education and age could also be considered in determining whether there existed any reasonable prospect that he would obtain more comparable employment in the future. On this record, therefore, defendants' motion for a new trial on the issue of the award of front pay to Woodman must be denied.

Finally, defendants contend that the jury's award of damages of $321,924.31 to Woodman for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Woodman presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he felt scared, ashamed and betrayed. Woodman Tr. at 60- 64. Woodman stated that he suffered sleeplessness and that he has remained scared, irritable, anxious about the future and paranoid since the IRIF. *Id.* at 140-41. Woodman sought no treatment for any of these consequences of the IRIF. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Woodman's damages for emotional distress is granted unless Woodman files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

IV. Plaintiffs' Motions

Plaintiffs seek awards of prejudgment interest, postjudgment interest, an upward adjustment of the judgment in light of plaintiffs' increased tax liabilities, and attorneys' fees and costs.

A. Prejudgment Interest

Plaintiffs seek an award of prejudgment interest for the damages awarded for back pay and for past emotional distress for the period from the effective date of the IRIF, January 12, 1996, through the date of the judgment on the jury's

verdicts, December 5, 2000. Pls. Mem. of Law (Docket No. 141) at 4-6. Defendants do not oppose an award of prejudgment interest for back pay or the methodology proposed by plaintiffs for calculating prejudgment interest, but defendants oppose any award of prejudgment interest for the awards for past emotional distress. Defs. Mem. of Law (Docket No. 201) at 2-4. Therefore, without objection, plaintiffs' motion for an award of prejudgment interest on the back pay awards is granted for the period from January 12, 1996 through December 5, 2000, and such interest shall be calculated by (1) dividing the back pay awards evenly over the period from January 12, 1996 through December 5, 2000; (2) the average annual United States Treasury bill rate of interest referenced in 28 U.S.C. § 1961 shall then be applied to each component period; and (3) the interest shall be compounded annually. *See Hogan*, 144 F. Supp. 2d at 141; *Stratton v. Department for the Aging for the City of N.Y.*, No. 91 Civ. 6623(SAS), 1996 WL 352909, at *4 (S.D.N.Y. June 25, 1996).

Defendants oppose plaintiffs' motion for an award of prejudgment interest for the awards of damages for past emotional distress. Plaintiffs contend that such an award should be made to insure that plaintiffs are made whole. *See Robinson v. Instructional Sys., Inc.*, 80 F. Supp. 2d 203, 207 (S.D.N.Y. 2000) ("courts also exercise their discretion to award prejudgment interest on compensatory damage awards when interests of fairness and full compensation to the plaintiff so require"). However, for two reasons, plaintiffs' motion for prejudgment interest on the awards for past emotional distress is denied.

First, prejudgment interest is generally awarded "to compensate the plaintiff for loss of the use of money wrongfully withheld through an unlawful discharge." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 281 (2d Cir. 1987). Unlike the awards for back pay, the awards here for past emotional distress did not compensate plaintiffs for any money withheld as the result of the IRIF but for emotional injuries suffered as a result thereof. Thus, prejudgment interest on those awards is not required to insure that plaintiffs are made whole in that regard.

Second, the awards for past emotional distress were made under the HRL. New York courts generally hold that prejudgment interest is unavailable for awards for past emotional distress. *See Campbell v. Metropolitan Property & Cas. Ins. Co.*, 239 F.3d 179, 186-87 (2d Cir. 2001); *Miller v. Santoro*, 227 A.D.2d 534, 535, 643 N.Y.S.2d 168 (2d Dep't 1996) (correcting judgment which erroneously awarded preverdict interest for conscious pain and suffering); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc.2d 325, 333, 672 N.Y.S.2d 230 (1997) ("courts of New York State have consistently held that pre-verdict interest is *not* available on an award of compensatory damages") (emphasis in original); *see also* N.Y. C.P.L.R. § 5001(a) (McKinney Supp.2001).

Therefore, both because considerations of fairness do not support an award of prejudgment interest for past emotional distress here and because plaintiffs' awards for past emotional distress were made under the New York HRL and New York law does not authorize prejudgment interest for such awards, plaintiffs' motion for prejudgment interest

on their awards for past emotional distress is denied.

B. Postjudgment Interest

Plaintiffs seek an award of postjudgment interest pursuant to 28 U.S.C. § 1961 on all amounts awarded from December 5, 2000, the date the amended judgment was filed, until the judgment is satisfied. Pls. Mem. of Law at 6- 7. Defendants do not oppose this motion. Accordingly, plaintiffs' motion is granted and plaintiffs are granted postjudgment interest on all amounts awarded from December 5, 2000 to the date the judgment is satisfied.

C. Upward Adjustment for Increased Taxes

Plaintiffs also seek an upward adjustment of their awards to offset what they contend are adverse tax consequences from the lump sum awards. Pls. Mem. of Law at 7-8. Plaintiffs rely on the only case which research reveals has awarded such an adjustment. *See O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 446-48 (E.D.Pa.2000). However, plaintiffs offered no evidence on any claimed adverse tax consequences at trial. Moreover, the evidence offered in support of this motion fails to demonstrate any such adverse consequence. Plaintiffs offer only a proposed methodology for calculating such tax consequences[29] and a conclusory "demonstration" of that methodology as to plaintiff Reynheer which would result in an upward adjustment of Reynheer's

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29. *See* Barry Ben-Zion, *Neutralizing the Adverse Tax Consequences of a Lump-Sum Award in Employment Cases*, 13 J. of Forensic Econ. 233 (2000).

award by approximately sixty-five to eighty-five percent.[30] No basis for this conclusion is provided and, therefore, plaintiffs' "demonstration" is unduly speculative. Finally, the *O'Neill* case provides the only authority for such an upward adjustment, but that case acknowledged that it stood alone, it has yet to be followed by any other court and it limited its upward adjustment to an award for back pay and front pay but not damages for emotional distress, a limitation plaintiffs ignore here. In these circumstances plaintiffs' motion for an upward adjustment must be denied.

D. Attorneys' Fees and Costs

Plaintiffs seek attorneys' fees and costs totaling $1,037,818.08 for those fees and costs incurred through November 22, 2000[31] when the jury returned its last verdict. Docket No. 197. Such fees and costs are sought under the ADEA against defendants KAPL and Lockheed Martin. The ADEA mandates an award of reasonable attorneys' fees and costs to a prevailing plaintiff to the extent authorized by the

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30. According to plaintiffs' counsel, Reynheer's award of $1,115,357.58 should be adjusted upward by $948,054. Pls. Mem. of Law at 8. According to plaintiffs' economist, that award should be adjusted upward by $718,341. Riccardi Aff. (Docket No. 140) at ¶ 10.

31. Plaintiffs' motion concerns fees and costs incurred to the date of the last verdict. Plaintiffs' counsel have incurred additional fees and costs since that date, *inter alia*, in responding to defendants' posttrial motions. Accordingly, plaintiffs are granted leave to file a supplemental motion for attorneys' fees and costs incurred subsequent to November 22, 2000.

Appendix B

Fair Labor Standards Act, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b); *Lightfoot*, 110 F.3d at 913. "The operative term is 'reasonable.' " *Tanzini*, 978 F. Supp. at 82.

1. Attorneys' Fees

Plaintiffs seek a total of $979,348.71 in attorneys' fees. To determine the reasonable amount of attorneys' fees, a court must first multiply the number of hours expended by a plaintiff's attorney in prosecuting a case by the reasonable hourly rate charged by the attorney to establish a "lodestar" figure. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Certain adjustments may then be made to this lodestar figure to arrive at a final award. *Tanzini*, 978 F. Supp. at 83-84. Here, plaintiffs seek an award for fees charged by three attorneys, a law clerk who was admitted to practice as an attorney during the pendency of this case, and three paralegals.

a. Hours Expended

Plaintiffs contend that their attorneys and staff expended a total of 6,935 hours in prosecuting this case. DuCharme Aff. (Docket No. 197) at Exs. A-E. Defendants challenge the hours claimed in several respects.

Plaintiffs assert that the hours claimed do not include any hours expended in prosecuting the claims of (a) the two plaintiffs for whom the jury returned a verdict in favor of defendants, or (b) the eight plaintiffs who settled

their claims following the liability phase of the trial.[32] *Id.* at ¶¶ 6-8. Defendants generally accept the method by which plaintiffs excluded hours expended on the claims of these ten plaintiffs. Defs. Mem. of Law (Docket No. 201) at 15-16. However, defendants contend that there should be further exclusions where plaintiffs' records indicate that the attorneys' time was devoted exclusively to one or more of the ten defendants and where plaintiffs' exclusion of time did not sufficiently reflect the portion of that time devoted to on or more of the ten plaintiffs. *Id.* at 16-17 & nn.7, 8. The total fees claimed for such entries in plaintiffs' records is $4,175.52. A review of plaintiffs' records confirms defendants' contention in whole regarding those instances where the entire billing entry was devoted to one or more of the ten plaintiffs. *See* Defs. Mem. of Law at 16 n.7. However, where a billing entry was devoted in one-half to one of the ten plaintiffs, a review of the records indicates that defendants are incorrect as to one such entry and that the reduction sought was miscalculated as to the others. *See id.* at 17 n.8. Therefore, the lodestar figure will be reduced on this account by a total of $3,412.52.

Defendants challenge several categories of the hours claimed on the ground that such hours were redundant and unnecessary. Defs. Mem. of Law at 17-19; *see Hensley*, 461 U.S. at 432; *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 97 (2d Cir. 1997). First, defendants contend that three

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32. A ninth plaintiff, Christine A. Palmer, settled her claims after plaintiffs filed this motion. *See* note 12 *supra*. The extent to which, if at all, the hours expended by plaintiffs' counsel should be adjusted because of that settlement is unclear. Accordingly, this motion is considered without adjustment for the Palmer settlement.

meetings with plaintiffs attended by all three of plaintiffs' attorneys and for which all three attorneys billed their full hourly rate was unnecessary. Defs. Mem of Law at 17-18. However, while it may generally hold that one attorney will suffice to provide services in most instances, there may arise certain situations at critical junctures of cases which require the attendance and participation of two or more attorneys. In these three instances, the three attorneys attended meetings at the outset of the case with various plaintiffs to obtain information and assess the potential of the case. Given the number of plaintiffs, the complexity of the case and the impact of a commitment to accept this case to a law firm like that of plaintiffs' counsel with only three attorneys, these early meetings were sufficiently important that the attendance of all three attorneys was not unreasonable. Accordingly, the hours claimed by all three attorneys for these meetings will be allowed.

Defendants also contend that in twelve instances, two or more of plaintiffs' attorneys billed for attendance at certain depositions. Defs. Mem. of Law at 18 (specifying the instances). A review of those twelve instances indicates that six of those instances actually involved meetings among plaintiffs' attorneys and the other six involved the depositions of key KAPL officers and employees. Meetings among counsel to review and discuss developments in the case were essential and, therefore, reasonable. Defendants have not suggested, nor does it appear from the billing records of plaintiffs' counsel, that such meetings were held with excessive frequency. As to the depositions, the attendance of two attorneys at a single deposition is not unreasonable as a matter of law. *See Hogan*, 144 F. Supp. 2d at 141 (holding

in age discrimination case where two attorneys attended depositions on behalf of four plaintiffs that "[i]n light of the complexity of this case and the fact that [the prevailing plaintiff] was suing . . . a large company with significant resources at its disposal, the use of two attorneys was not unnecessary or unreasonable"); *Coffey v. Dobbs Int'l Servs., Inc.*, 5 F. Supp. 2d 79, 86 (N.D.N.Y. 1998), *rev'd on other grounds*, 170 F.3d 323 (2d Cir. 1999). The attendance of two attorneys for plaintiffs at depositions appears to have been limited to such important witnesses as only one attorney generally attended depositions for plaintiffs. In the circumstances of this case, it was not unreasonable for two attorneys to attend those particular depositions. Accordingly, the hours claimed by plaintiffs' counsel will not be reduced in these instances.

Defendants also contend that the hours claimed should be reduced by the hours claimed for consultation with an expert witness who was never retained or called to testify by plaintiffs. Defs. Mem. of Law at 19 & n.9. However, it was not unreasonable for plaintiffs to explore the possibility of calling other expert witnesses as case preparations proceeded and the time expended in this regard was not excessive. Defendants further contend that time expended in drafting a letter to the DOE after the liability phase and before the damages phase and time expended in that period for legal research on liability after liability had been found by the jury were unnecessary. *Id.* at 19. However, settlement discussions between the parties were ongoing in this period, the records of the DOE being sought in the letter were potentially relevant to both settlement and the damages phase of the trial, and the legal research on liability was likewise useful to plaintiffs

in their settlement discussions both as to damages awarded in disparate impact cases and to refute defendants' continuing assertions that the evidence did not support the verdict on liability. Thus, the hours claimed in these instances were not unreasonable and will not be reduced.

Finally defendants point out what appears to be a billing error in the duplicate entries for March 26 and 27, 1998. Defs. Mem. of Law at 19. The entries are identical in all respects and only one such charge is reasonable. Accordingly, the lodestar will be reduced by a total of $218.59 for the duplication of charges in this instance.

b. Hourly Rates

With one exception, the hourly rates claimed by plaintiffs' counsel are within the range of those previously found reasonable in this district, defendants take no issue with those rates and the rates claimed are allowed. The exception concerns Kimberly Ann Harp. Harp began work on this case for plaintiffs' counsel in 1997 when she was a second-year law student. DuCharme Aff. at ¶ 36. She continued to provide legal services throughout this case, including after her graduation from law school and admission to the bar in 1999. Plaintiffs claim hourly rates of $90-$100 throughout the case for work performed by Harp. Defendants do not challenge that rate for work performed after Harp was admitted to the bar but contend that the rate is excessive for work performed prior to that time. Defs. Mem. of Law at 14-15. Defendants contend that Harp's hourly rate should be no more that $65 prior to her admission to the bar. *See John S. v. Cuomo*, 1999 U.S. Dist. LEXIS 12209, No. 90-CV-294

(NPM), 1999 WL 592693, at *2 (N.D.N.Y. July 29, 1999) (McCurn, J.) (awarding hourly rate of $65 for law student work). Defendants' contention finds support in the cases decided in this district. *See, e.g., id.*; *Hannigan v. Board of. Educ. of Brunswick Sch. Dist.*, 1997 U.S. Dist. LEXIS 291, No. 95-CV-1435 (FJS), 1997 WL 10971, at *3 (N.D.N.Y. Jan. 9, 1997) (Scullin, J.) (awarding hourly rate of $50 for law student work). Recalculating the amounts claimed by plaintiffs at the lower hourly rate for Harp requires that the lodestar fugure claimed by plaintiffs be reduced by a total of $4,753.05.

Reducing the lodestar figure of $979,348.71 claimed by plaintiffs by the three amounts described above yields a total lodestar figure of $970,964.55.

c. Adjustments

There exists "a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington v. Dague*, 505 U.S. 557, 561, 120 L. Ed. 2d 449, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986)). Adjustments may be made to the lodestar figure for various reasons, but the party seeking such an adjustment bears the burden of establishing its reasonableness. *See id.* (citing *Blum v. Stenson*, 465 U.S. 886, 898, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984)).

Plaintiffs contend that the lodestar figure should be adjusted upward in an unspecified amount given various factors present in this case, including the novelty and difficulty of the issues, the skill required to represent the

plaintiffs successfully and the result obtained. Pls. Mem. of Law at 5 (citing *Hensley*, 461 U.S. at 434). There is no question that plaintiffs' counsel demonstrated uncommon skill in prosecuting this case on behalf of twenty-eight plaintiffs against defendants with substantial resources and themselves represented by skilled counsel. The result obtained for the plaintiffs was also unqualifiedly successful. However, the lodestar figure reasonably reflects not only the time, effort, resources and skill required of plaintiffs' counsel in this case but bears a reasonably proportionate relationship to the result obtained. Accordingly, plaintiffs have failed to meet their burden of demonstrating that the lodestar figure should be adjusted upward.

Defendants contend that the lodestar figure should be adjusted downward by fifty percent in light of plaintiffs' limited success in prevailing on the disparate impact theory but not on the disparate treatment theory. Defs. Mem. of Law at 19-24. As noted above, the lodestar figure includes downward adjustments for the jury's verdict in favor of defendants as to two plaintiffs and the settlement of the claims of eight other plaintiffs. Defendants, therefore, seek the downward adjustment here solely on the ground of the jury's rejection of the disparate treatment theory.

The lodestar figure may be adjusted downward where a plaintiff prevailed on certain claims but not on others. However, no reduction on this ground should be made "if the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories.' " *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir. 1996) (quoting *Dominic*

v. Consolidated Edison Co., 822 F.2d 1249, 1259 (2d Cir. 1987)); *Hogan*, 144 F. Supp. 2d at 141; *Tanzini*, 978 F. Supp. at 83. Thus, "[s]o long as the plaintiff's unsuccessful claims are not 'wholly unrelated' to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994) (quoting *Grant v. Martinez*, 973 F.2d 96, 101 (2d Cir. 1992)).

The determination whether successful and unsuccessful claims bear a sufficiently close relationship that no downward adjustment for limited success should be made is necessarily informed by the facts of each case. However, courts have held in other cases that, for example, claims of age discrimination and retaliatory discharge were inextricably intertwined, *see Dominic*, 822 F.2d at 1259; claims of sexual harassment, sex discrimination, retaliation and age discrimination were inextricably intertwined, *Greenbaum v. Svenska Handelsbanken, N.Y.*, 998 F. Supp. 301, 306 (S.D.N.Y. 1998); and claims of a failure to promote and wrongful termination, both based on age and disability discrimination, were inextricably intertwined. *Tanzini*, 978 F. Supp. at 84.

Here, plaintiffs' claims of age discrimination were asserted on the alternative theories of disparate treatment and disparate impact. The two theories are closely related. Moreover, the preparation and trial on the two theories involved the discovery and testimony of virtually all the same witnesses regarding how the individual plaintiffs were treated in the IRIF and whether there existed reasonable alternatives to the IRIF. Moreover, plaintiffs' claim that defendants acted

willfully involved virtually identical evidence under either theory. Given the inherently close relation of the two theories, the fact that the evidence concerning the two theories substantially overlapped in this case and the "common core of facts" underlying the two theories, it cannot be said that the two theories were wholly unrelated.

Nevertheless, to a minimal degree the preparation and trial of the two theories required plaintiffs' counsel to devote time to the unsuccessful disparate treatment theory. A reduction of ten percent to account for such time appears appropriate. *See Greenbaum*, 998 F. Supp. at 307 (reducing fee by ten percent where successful and unsuccessful claims inextricably intertwined); *Dailey v. Societe Generale*, 915 F. Supp. at 1315, 1331 (S.D.N.Y. 1996) (reducing lodestar figure by ten percent). Thus, the lodestar figure will be reduced on this ground by $97,096.46. For the reasons set forth above, plaintiffs are awarded attorneys' fees in the total amount of $873,868.09.

2. Costs

Plaintiffs also move for an order awarding them costs totaling $58,469.37 incurred in the litigation of this case. Pls. Mem. of Law at 6. As prevailing parties, plaintiffs are entitled to recover taxable costs pursuant to 28 U.S.C. § 1920 and "all reasonable out-of-pocket expenses that are normally charged to clients." *O'Grady v. Mohawk Finishing Prods., Inc.*, 1999 U.S. Dist. LEXIS 6076, No. 96-CV-1945, 1999 WL 30988, at *7 (N.D.N.Y. Jan. 15, 1999) (Scullin, J.); *see also LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998); *Hogan*, 144 F. Supp. 2d at 143. Ordinary

overhead expenses are not recoverable. *LeBlanc-Sternberg*, 143 F.3d at 763. Whether a particular item constitutes ordinary overhead or an awardable cost depends on whether the item is one normally absorbed within the attorney's fee or separately charged to a client. *See id.* Defendants challenge various costs claimed by plaintiffs.

a. Fees for the Depositions of Defendants' Experts

Plaintiffs seek a total of $7,350.00 for fees paid to defendants' two expert witnesses as fees for their depositions. DuCharme Aff., Ex. F at 4. Such costs are those incurred in obtaining discovery, such as the costs of a stenographer or a witness' travel, and are normally charged to a client. Accordingly, plaintiffs are awarded such costs.

b. Computerized Research

Plaintiffs seek an award of $350.18 for computer research. DuCharme Aff., Ex. F at 2-7. Such costs are not compensable on this record. *See United States ex rel. Evergreen Pipeline Constr. v. Merritt-Meridian Constr. Corp.*, 95 F.3d 153, 173 (2d Cir. 1996); *Tanzini*, 978 F. Supp. at 85 (holding that costs of computer research not compensable "in the absence of an hour/rate showing by plaintiff"). Accordingly, the costs claimed by plaintiffs will be reduced by $350.18.

c. Supplies

Plaintiffs seek $458.23[33] for exhibit tabs and binders. Defs. Mem. of Law at 9 & n.4. Such costs constitute routine office overhead and are not compensable here. The amount of $458.23 will be deducted from the costs claimed by plaintiffs.

d. Photocopies

Plaintiffs seek a total of $24,438.00 for photocopying 97,752 pages of documents in this case, a rate of $.25 per page. DuCharme Aff., Ex. F at 7. Defendants challenge both the sufficiency of the documentation for this claim and the page rate of $.25 claimed by plaintiffs. Defs. Mem. of Law at 9-10.

Plaintiffs' description of this item states in total as follows: "12/15/00—Copy charge at $.25 per sheet x 97,752 sheets—$24,438.00." No supporting documentation or affidavit describing this claim is included. While the documents and, therefore, the photocopying in this case was substantial, it cannot be determined from plaintiffs' submissions whether a portion of the photocopying claimed was for the convenience of counsel or the plaintiffs or was otherwise unnecessary to the litigation.[34] Accordingly, the

33. Plaintiffs claim $297.05 for "copying and exhibit binders" on 9/9/00. DuCharme Aff., Ex. F at 6. In the absence of itemization, this charge is divided evenly between copying and binders.

34. A reduction for that portion of the costs attributable to the ten plaintiffs who did not prevail or have settled their claims is discussed *infra* at subsection h.

number of photocopies for which plaintiffs claim reimbursement will be reduced to 75,000. *See Baker v. Power Securities Corp.*, 174 F.R.D. 292, 295 (W.D.N.Y.1997) (reducing amount claimed for photocopying costs for insufficient documentation).

Plaintiffs claim photocopying costs at the rate of $.25 per page. Plaintiffs have submitted no supporting documentation for this rate in the form of rates normally charged in this region for outside or in-office copying or the rate plaintiffs' counsel normally charged its clients for photocopying. Other courts have found photocopying rates of $.10 per page appropriate. *See, e.g., Hogan*, 144 F. Supp. 2d at 144; *Rodriguez ex rel. Kelly v. McLoughlin*, 84 F. Supp. 2d 417, 426 (S.D.N.Y. 1999); *In re Towers Fin. Corp. Noteholders Litigation*, 1997 U.S. Dist. LEXIS 44, No. 93CIV.0810 (WK)(AJP), 1997 WL 5904, at *1 (S.D.N.Y. Jan. 8, 1997). Multiplying 75,000 pages by $.10 yields a compensable total of $7,500.00. Accordingly, the costs claimed by plaintiffs will be reduced by $16,938.00.

e. Parking

Plaintiffs seek $515.00 for parking fees incurred by their counsel in attending depositions and court proceedings. *See, e.g.*, DuCharme Aff., Ex. F at 4-7. Defendants contend that such fees are not recoverable. Parking fees are recoverable as litigation costs. *See Kuzma v. I.R.S.*, 821 F.2d 930, 933 (2d Cir. 1987) (holding that parking fees "clearly represent the reasonable costs of litigation and are recoverable"). Accordingly, plaintiffs' claim for parking fees will be allowed.

f. Court-Ordered Payment to Defendants' Expert Witness

Before trial, a schedule was established for the parties to file motions in limine, including any motions regarding expert witnesses. *See, e.g.*, Docket No. 53 (defendants' motion in limine to preclude plaintiffs' expert witness). Plaintiffs made no such motion. During the liability phase, defendants called Dr. Frank Landy, an industrial psychologist, who had previously been disclosed to plaintiffs, to testify as an expert witness. Plaintiffs' counsel for the first time moved to preclude Dr. Landy's testimony. Dr. Landy's testimony was then postponed to permit plaintiffs and defendants to submit briefs on the issue. Docket Nos. 82, 83. As a consequence of their untimely motion, plaintiffs were ordered to reimburse defendants for the costs incurred in Dr. Landy's postponed appearance. Plaintiffs thereafter reimbursed defendants in the amount of $4,196.26. DuCharme Aff., Ex. F at 5. Plaintiffs now claim this payment as a cost of litigation and seek recovery. However, this cost was incurred by plaintiffs' counsel as a result of their failure to file their motion on time. This cost was not an ordinary litigation expense and, because it resulted from counsel's error, could not ordinarily be charged to a client. Accordingly, the costs claimed by plaintiffs will be reduced by $4,196.26.

g. Lodging

Plaintiffs claim a total of $972.96 for lodging and meals for their counsel in traveling to New York City to defend the depositions of plaintiffs' expert witnesses. DuCharme Aff., Ex. F at 4. Defendants contend that this item lacks sufficient

documentation. Defs. Mem. of Law at 11. As defendants note, plaintiffs' claim simply states the total amounts for lodging ($740.96) and meals ($232.00) for the period from May 24-29, 1999. The time records of plaintiffs' counsel indicate that these expenses were incurred by one attorney. *Id.*, Ex. D at 22-23. Thus, plaintiffs' counsel paid $185.24 per night for lodging for four nights in New York City and spent an average of $46.40 per day for five days for meals. Neither amount is unreasonable, their documentation is sufficient here, and plaintiffs will be allowed these costs.

h. Adjustment of Costs

As noted above, plaintiffs' claims for attorneys' fees was adjusted downward by plaintiffs to exclude that portion of the fees incurred on behalf of the ten plaintiffs who previously settled their claims or who did not prevail at trial. DuCharme Aff. at ¶¶ 6-8. It does not appear from plaintiffs' motion that any similar exclusion was performed for the costs claimed and that the costs claimed constitute all costs incurred in the litigation. Defendants contend that the costs claimed should be reduced by the portion of those costs attributable to the ten plaintiffs. Defs. Mem. of Law at 7 n.2. Any costs incurred on behalf of the two nonprevailing plaintiffs are not recoverable here. It is unclear whether the costs incurred on behalf of the eight settling plaintiffs were included in any of their settlement agreements. In the absence of proof that the parties agreed in those settlement agreements that plaintiffs could seek an award for costs incurred on behalf of those eight plaintiffs as part of this motion, plaintiffs have failed to satisfy their burden of demonstrating entitlement to costs on behalf of those plaintiffs.

Accordingly, after the costs claimed by plaintiffs have been reduced in the amounts indicated above, that adjusted claim for costs must be further reduced in accordance with the methodology utilized by plaintiffs to exclude the attorneys' fees incurred on behalf of the ten plaintiffs. Plaintiffs' claim for costs of $58,469.37 must be reduced as indicated above by a total of $21,942.67, yielding an adjusted claim for costs of $36,526.70. The methodology utilized by plaintiffs and accepted by defendants for deducting the portion attributable to the ten plaintiffs requires that this adjusted claim for costs be reduced by 35.71%, or $13,043.68. DuCharme Aff. at ¶ 8. Therefore, plaintiffs are awarded costs in a total amount of $23,483.02.

V. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. Defendants' motion (Docket No. 137) for:

A. Judgment as a matter of law is **DENIED**; and B. A new trial or remittitur is **DENIED** in all respects except as to the following:

i. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Raymond E. Adams, Clifford J. Levendusky, Neil R. Pareene, William C. Reynheer, Allen G. Sweet and Carl T. Woodman is **GRANTED** *unless* such plaintiffs file and serve written

acceptances of remittitur of the emotional distress components of their damages awards to $125,000 each on or before **March 8, 2002**; and

ii. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Bruce E. Palmatier and David W. Townsend is **GRANTED** *unless* such plaintiffs file and serve written acceptances of remittitur of the emotional distress components of their damages awards to $175,000 each on or before **March 8, 2002**;

2. Plaintiffs' motion (Docket No. 138) for:

A. Prejudgment interest is **GRANTED** as to plaintiffs' back pay awards and is **DENIED** in all other respects;

B. Postjudgment interest is **GRANTED**; and

C. An upward adjustment of damages for increased taxes is **DENIED**; and

3. Plaintiffs' motion (Docket No. 197) for an award of attorneys' fees and costs incurred through November 22, 2000 is **GRANTED**, and plaintiffs are awarded attorneys' fees in the amount of $873,868.09 and costs in the amount of $23,483.02.

IT IS SO ORDERED.

DATED: February 13, 2002

Albany, New York

David R. Homer

UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of October two thousand four.

02-7378(L), 02-7474(XAP)

Clifford B. Meacham, et al.

Plaintiffs-Appellees-Cross-Appellants

v.

Knolls Atomic Power Laboratory

Defendants-Appellants-Cross-Appellees

A petition for panel hearing and a petition for rehearing en banc having been filed herein by the appellant Clifford Meacham, et al.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: s/ [illegible]
Motion Staff Attorney

APPENDIX D — STATUTES AND REGULATIONS INVOLVED IN THE CASE

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 621, *et seq.*

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

. . .

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization —

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . .

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

NEW YORK HUMAN RIGHTS LAW

N.Y. Executive Law Section 290, *et seq.*

§ 296. Unlawful discriminatory practices.

3-a. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age.

. . .

(d) Notwithstanding any other provision of law, no employee shall be subject to termination or retirement from employment on the basis of age, except where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, where the differentiation is based on reasonable factors other than age, or as otherwise specified in paragraphs (e) and (f) of this subdivision or in article fourteen-A of the retirement and social security law.

EQUAL PAY ACT

29 U.S.C. § 206

§ 206(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

Appendix D

Title VII of the Civil Rights Act

42 U.S.C. § 2000e, *et seq.*

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Appendix D

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

. . .

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

Appendix D

EEOC REGULATIONS ON THE AGE DISCRIMINATION IN EMPLOYMENT ACT

29 C.F.R. Part 1625

Sec. 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that

*** it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section *** where the differentiation is based on reasonable factors other than age ***.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at part 1607 of this title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(3)

No. 04-955

Supreme Court, U.S.
FILED
FEB 7 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually, and as an employee of KAPL, and Lockheed Martin,

Petitioners,

-against-

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, and ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES TO PROCEEDING

The petition for a writ of certiorari fails to include one party who has an interest in this proceeding. Petitioners set forth that William C. Reynheer, "is believed to have no interest in the outcome of this petition". (*See*, Petition for a Writ of Certiorari, pg. ii). The Petitioners' belief in this regard is without basis.

Prior to his death on October 10, 2004, Mr. Reynheer was a party to this age discrimination lawsuit. On May 14, 2002, the Third Amended Judgment was entered in Mr. Reynheer's favor against the Petitioners awarding him $667,942.28, plus interest and attorney fees. The Petitioners have not satisfied this money judgment.

On November 26, 2004, Mr. Reynheer's wife, Margaret P. Reynheer, was granted Letters Testamentary by the Surrogate Court in and for Schenectady County, New York. On January 25, 2005, an Order was issued by the Second Circuit Court of Appeals substituting Mrs. Reynheer for her deceased husband, William C. Reynheer, pursuant to FRAP 43(a)(1). A copy of the Second Circuit's Order is annexed hereto as Appendix "A". William C. Reynheer's estate continues to have a substantial interest in the outcome of this matter.

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INTRODUCTION

This is an age discrimination case which relates back to a 1995 involuntary reduction in force ("RIF") at the Knolls Atomic Power Laboratory located in upstate New York. That RIF resulted in the termination of 31 exempt, salaried employees, 30 of whom were over 40 years of age.

After exhausting their administrative remedies before the Equal Employment Opportunity Commission ("EEOC"), 26 of the 30 older, exempt, salaried employees terminated in the RIF commenced this action against Petitioners alleging illegal age discrimination in violation of both the Age Discrimination in Employment Act (29 U.S.C. § 621, *et seq.*, "ADEA"), and the New York State Human Rights Law (Executive Law § 290, *et seq.*, "NYSHRL").

The ADEA provides, in pertinent part, that, "it shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . ." (29 U.S.C. § 623(a)(2)). The NYSHRL is similar in that it provides, in pertinent part, that, "[i]t shall be an unlawful discriminatory practice . . . [f]or an employer . . . , because of the age . . . of any individual, . . . to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (Executive Law § 296(1)(a)). After a trial on liability, the jury found:

> As to the twenty-six plaintiffs who were employed in *exempt* positions, do you find that the plaintiffs have proven that a specific employment practice of the defendants listed below,

although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages?

Knolls Atomic Power Laboratory, Inc.	✓ Yes	__ No
Lockheed Martin, Inc.	✓ Yes	__ No
John J. Freeh	✓ Yes	__ No

Do you find that the plaintiffs have proven that in discriminating on the basis of age, the defendant acted willfully?

Knolls Atomic Power Laboratory, Inc.	✓ Yes	__ No
Lockheed Martin, Inc.	✓ Yes	__ No

The jury's liability verdict determined that Petitioners, as employers, willfully violated the ADEA and the NYSHRL when they instituted a specific employment practice which adversely affected Respondents, as employees, because of their ages.

During the damages phase of the trial, the jury awarded each Respondent money damages under both the ADEA and the NYSHRL to compensate them for the economic losses and/or mental anguish suffered as a result of Petitioners' unlawful age discrimination.

The jury's verdict was supported by the evidence at trial. It was upheld by the United States District Court for the Northern District of New York. *Meacham, et al. v. KAPL, Inc., et al.*, 185 F.Supp.2d 193 (N.D.N.Y. 2002). The District Court's decision was thereafter affirmed by the United States Court of Appeals for the Second Circuit. *Meacham, et al. v. KAPL, Inc., et al.*, 381 F.3d 56 (2d Cir. 2004).

Petitioners now ask this Court to address whether a disparate impact age discrimination claim is viable under the ADEA. (*See*, Petition for a Writ of Certiorari, pg. i). The Court should deny the petition in this regard on the grounds that: (1) the Second Circuit ruled that Petitioners waived this argument. *Meacham*, 381 F.3d at 70 (2d Cir. 2004) ("KAPL's failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver"); and (2) the conflict among the circuit courts of appeals regarding this precise issue will be resolved when the Supreme Court decides *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004).

Petitioners also ask this Court to provide the applicable evidentiary standards to establish a disparate impact age discrimination claim under the ADEA. (*See*, Petition for a Writ of Certiorari at pg. i). The Court should deny the petition in this regard on the grounds that: (1) the petition fails to allege that there is any disagreement among the lower courts regarding the applicable evidentiary standards to prove disparate impact age discrimination under the ADEA; and (2) Petitioners are now raising several new issues which were never presented to nor ruled on by the jury, the District Court, or the Second Circuit.

Finally, Petitioners ask this Court to resolve whether the Second Circuit was bound to apply New York's substantive law regarding the NYSHRL, as articulated by the State Appellate Division Third Department. (*See*, Petition for a Writ of Certiorari at pg. i). The Court should deny the petition in this regard on the grounds that: (1) both the District Court and the Second Circuit held that Petitioners waived their argument that disparate impact is unavailable under the NYSHRL; (2) the Second Circuit was

justified in not following that Third Department's decision since that court was misinterpreting two prior holdings of the Second Circuit; and, (3) this argument does not present a compelling federal question which is of importance to the public.

COUNTER STATEMENT OF THE CASE

The rules of this Court instruct counsel to, "address any perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." (Sup.Ct.R. Rule 15). The petition in this case is replete with self-serving misstatements of fact which have no support in the record before the District Court nor the Second Circuit.

The misstatements of fact include Petitioners' claim that they "attempted to meet their staffing ceiling without laying off employees involuntarily, but could not avoid the RIF." (*See*, Petition for a Writ of Certiorari at pg. 3). They erroneously claim that they "reviewed the reasons supporting each termination and concluded that each of the low rankings was the result of legitimate, non-discriminatory reasons unrelated to the individual's age." (*Id.* at pgs. 3-4). They falsely assert that they "proceeded, in good faith, with the RIF". (*Id.* at pg. 4). Finally, Petitioners mislead the Court by claiming that "[e]ach layoff selection was reviewed by a panel of senior managers called the Review Board" and that "KAPL's in-house counsel also reviewed the ranking process." (*Id.*). All of these claims are self-serving, have no support in the record, and were rejected by the jury, the District Court, and the Second Circuit.

The Second Circuit found that for fiscal year 1996, the manpower ceiling at the Knolls Atomic Power Laboratory would be declining by 108 jobs. *Meacham*, 381 F.3d at 63. Despite this fact, Petitioners wanted to hire 35 new employees. *Id.*

Contrary to Petitioners' self-serving claims, they did not proceed in good faith with respect to age discrimination and the RIF. As the Second Circuit noted in its decision, before the RIF started, Petitioners, "made several different projections concerning its impact on the workforce by age group." *Meacham*, 381 F.3d at 63. These projections included numerous tables analyzing the RIF which organized the workforce into age categories and included a document which stated:

> Cost data for each job group was utilized based on what age group we believe would be impacted. For example – there are a large number of excess skills in the mechanical system engineering areas. The 30-39 year age group would be primarily affected.

The Second Circuit observed that before the RIF started, managers employed by Petitioners determined which sections had skills which were "excess". *Meacham*, 381 F.3d at 63. During the trial, Petitioners admitted that some managers raised concerns about losing younger employees in the impending workforce reduction, and that this was considered when Petitioners formulated their Workforce Reduction Plan ("WRP"). The documentary evidence presented at trial corroborated this. For example, one manager wrote a letter to those drafting the WRP in which he stated his ideas for the downsizing, and cautioned against a "last in first out" methodology, since Petitioners would "lose some of best young hires". The

manager who principally designed the WRP even wrote in his diary "*Target Retirement Age*".

Contrary to the argument asserted by Petitioners, the record established that they could have avoided the RIF. The Second Circuit found that since Petitioners were 108 jobs over their manpower budget, and they planned on adding 35 new employees, they needed to eliminate 143 employees. *Meacham*, 381 F.3d at 63. In order to accomplish this reduction, Petitioners studied voluntary separation plans (VSP) where employees would resign in exchange for money. *Id.* The Second Circuit observed that Petitioners "consistently estimated that the average voluntary separation would cost it less than the average involuntary termination." *Id.* Petitioners analyzed offering a VSP to its entire workforce provided applications could be rejected if business needs dictated. *Id.* Petitioners "estimated that between 200 and 250 people would have elected to participate in such a plan." *Id.* The District Court found that evidence established that this plan would have enabled Petitioners to reduce its headcount to a level at or below its manpower budget, at a comparable cost, without a disparate impact on employees 40 years of age or older. *Meacham*, 185 F.Supp.2d at 214.

Petitioners decided to enact a WRP which included both a limited VSP and a RIF. *Meacham*, 381 F.3d at 63. The VSP component was limited because it required employees to have at least 20 years of service to participate. *Id.* Petitioners offered the VSP to its employees and 108 eligible candidates applied. *Id.* Petitioners approved 107 applications. *Id.* Petitioners were only one position over budget. The District Court found that the evidence supported the conclusion that if Petitioners instituted a hiring freeze, the RIF could have been avoided. *Meacham*,

185 F.Supp.2d at 214. However, to make room for the 35 new hires, Petitioners elected to involuntarily terminate 36 employees. Petitioners replaced the eliminated jobs with positions filled by new, younger employees (average age: 27). *Id.* at 202 fn. 4 & 217.

The statistical evidence introduced during the trial refutes Petitioners' self-serving claim that they proceeded in good faith and that the termination decisions were unrelated to age. Immediately preceding the RIF, Petitioners employed 2,063 exempt employees. *Meacham*, 381 F.3d at 64. Of those employees, 58% were 40 years of age or older (hereinafter referred to as "older employees") and 42% were under 40 years of age (hereinafter referred to as "younger employees"). *Id.* at 65. During the trial, Petitioners admitted that all of the exempt employees were potentially exposed to termination under the RIF. *Meacham*, 185 F.Supp.2d at 209.

Petitioners identified sections which possessed excess skills following the VSP. *Meacham*, 381 F.3d at 63. Petitioners selected some, but not all, employees with excess skills to be compared on matrices. *Id.* Petitioners identified 245 of the 2,063 employees and listed them on 32 different matrices. *Id.* at 64. Of the 245 employees, 179 (73%) were older employees, and only 66 (27%) were younger employees. *Id.* at 65. Once on a matrix, employees were compared by managers in terms of their criticality, flexibility, performance, and company service. *Id.* at 63. This RIF process resulted in 31 exempt employees being terminated, 30 of whom (98%) were older employees. *Id.* at 64. The Second Circuit characterized these as "startlingly skewed results." *Id.* at 75 fn. 8.

The Second Circuit found that there was ample evidence to support the conclusion that Petitioners' "procedures for guarding against disparate impact age discrimination were inadequate." *Id.* at 77. The evidence established that Petitioners failed to take any meaningful steps to ensure that conscious or subconscious age bias did not infect the RIF process. During the trial, managers who selected older employees for termination testified that they received no training on avoiding age discrimination in the RIF. *Id.*

Petitioners are attempting to mislead the Court by arguing that to ensure fairness, they engaged in several levels of review before the RIF was implemented. For example, Petitioners refer to a panel of senior managers called the Review Board. However, the record establishes that the Review Board received no age discrimination training, was not provided with the ages of employees, and had no role in assessing or monitoring any issue regarding age discrimination. *Id.* at 64 & 77. During the trial, the District Court even observed, "there's no evidence . . . that the review board considered age in any of its examinations or any of its reviews in this matter." (Trial Transcript, pg. 1510)

Petitioners also claim that their in-house counsel reviewed the process. However, in its decision, the Second Circuit criticized counsel's review, characterizing it as "quite limited" and "far from systematic". *Id.* at 64, 75, 77. Counsel's review "appears to have consisted primarily of having a paralegal check the managers' math" on each matrix. *Id.* at 75. Despite knowing that 98% of those selected for termination were older employees, counsel failed to speak with each manager who completed a matrix. *Id.* at 64. During the trial, counsel testified that he

could recall speaking to only 3 of the more than 29 managers who prepared a matrix. He did not review the ages of those on a matrix. *Id.* He failed to perform an adverse age impact analysis in violation of Petitioners' WRP. *Id.* In fact, he relied on the adverse impact analysis prepared by an employee who had received no training on preparing such an analysis, and never read any books or articles on how to prepare one. *Id.* This adverse impact analysis compared the average age of Petitioners' workforce before the RIF with the average age of the workforce after the RIF. *Id.* The Second Circuit characterized this methodology as "patently inadequate". *Id.* at 77.

Dr. Janice Madden, a qualified expert in the area of employment discrimination and statistics, testified that after analyzing the demographics of Petitioners' entire workforce, the probability that 98% of those selected for termination would be older workers in an age neutral RIF was only 1 in 348,000. *Id.* at 65. She also testified that after analyzing the demographics of 245 employees placed on the matrices by Petitioners, the probability that approximately 98% of those selected for termination would be older workers in an age neutral RIF was 1 in 1,260. *Id.* The Second Circuit agreed with the District Court's finding that either of these populations was appropriate to study for disparate impact in this case. *Id.* at 67, 74. Dr. Madden testified that each of the disparities she observed was statistically significant. *Id.* She further testified that the manner in which Petitioners subjectively scored the employees for criticality and flexibility most accounted for the statistically significant disparities she observed. *Id.* Dr. Madden ruled out other non-age factors such as "excess skills" as possible explanations for these statistical disparities. *Id.* Finally, Dr. Madden concluded that the

procedures set up by Petitioners to review managers' decisions failed to offer adequate protections to keep the conscious and/or subconscious prejudices of managers from influencing the outcome of the RIF. *Id.*

The Second Circuit held that based on the record before it, there was at least one suitable alternative that Petitioners could have employed to reduce its headcount to a level at or below its manpower budget, at a comparable cost, without a disparate impact on employees 40 years of age or older. *Id.* at 75. Petitioners could have designed the RIF "with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Id.* The Second Circuit concluded that based on the evidence before it, Petitioners "could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs." *Id.*

As both the District Court and the Second Circuit held, there was ample evidence supporting the jury's verdict that Petitioners instituted a specific employment practice which adversely affected Respondents because of their ages in violation of both the ADEA and the NYSHRL.

REASONS FOR DENYING THE WRIT

POINT I

PETITIONERS WAIVED ARGUMENT THAT DISPARATE IMPACT IS UNAVAILABLE UNDER THE ADEA

This Court should deny Petitioners a writ of certiorari to consider whether a disparate impact age discrimination

claim is viable under the ADEA. The Second Circuit expressly held that Petitioners waived this argument before the District Court. *Meacham*, 381 F.3d at 70.

Petitioners waived this argument when they submitted their requests to charge the jury specifically asking the District Court to provide instructions regarding disparate impact under the ADEA. (*See*, Appendix "B", *Defendant's Proposed Request to Charge*, Instructions 18, 21, 22, 36 & 38). Moreover, both during the charge conference and after the District Court instructed the jury, Petitioners failed to assert an objection that disparate impact was unavailable under the ADEA. (*See*, Appendix "C", a copy of transcript setting forth the District Court's charge to the jury regarding disparate impact). Petitioners again waived their argument in this regard. *See*, Fed.R.Civ.P. Rule 51(d); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (holding that "there would be considerable prudential objection to reversing a judgment because of instructions that a petitioner accepted, and indeed itself requested."); *U.S. v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Lopez v. Davis*, 531 U.S. 230, 244 fn. 6 (2001); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002) (holding that "Ford asked for this jury charge, presumably for strategic reasons, and was well appraised of the law of waiver. To excuse Ford from well-established rules of waiver would permit precisely the sort of *sandbagging* that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve.")

Petitioners further waived their right to argue on appeal that disparate impact was unavailable under the ADEA, when they made and renewed their Rule 50 motion for judgment as a matter of law ("JMOL"). Petitioners did not seek a judgment dismissing Respondents' disparate

impact claim on the ground that it was unavailable under the ADEA. The Second Circuit properly held that Petitioners "failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver." *Meacham*, 381 F.3d at 70.

Petitioners correctly point out that there is disagreement among the circuit courts of appeals regarding whether the disparate impact theory may be used to prove a violation of the ADEA. However, in light of Petitioners' waiver, that should have no bearing on this case. The conflict among the courts of appeals regarding this precise issue will be resolved when the Supreme Court decides *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004). There, the parties fully briefed all of the issues which the Petitioners now seek to raise in Point I of their petition. There is no reason for this Court to revisit these issues. The Supreme Court has observed that "[w]e make poor use of judicial resources when, as here, we take a case merely to reaffirm (without revisiting) settled law." *Powell v. Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting), *citing*, *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), *United States v. Shannon*, 342 U.S. 288, 294-295 (1952) (opinion of Frankfurter, J.).

POINT II

THERE IS NO NEED FOR COURT TO PROVIDE GUIDANCE TO LOWER COURTS ON THE EVIDENTIARY STANDARDS FOR RESOLVING DISPARATE IMPACT CLAIMS UNDER THE ADEA

This Court should deny Petitioners a writ of certiorari to decide the applicable evidentiary standards to establish

a disparate impact age discrimination claim under the ADEA. It is respectfully submitted that: (1) the petition does not allege that there is any disagreement among the lower courts regarding this issue; and (2) Petitioners are now fundamentally changing their trial strategy by raising new issues which were never presented to nor ruled on by the jury, the District Court or the Second Circuit.

The Supreme Court's rules set forth the character of reasons that will be considered in deciding a petition seeking a writ of certiorari. Sup.Ct.R. Rule 10. "Among these considerations is whether there is a conflict between two courts of appeals, between a court of appeals and the highest court of a State, or between two state courts of last resort." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting). Petitioners fail to allege that there is any disagreement among the lower courts as to the appropriate evidentiary standards to prove disparate impact age discrimination under the ADEA. Before the Supreme Court expends its limited time on this issue, other courts of appeals should have the opportunity to express their opinions to see if any conflict develops.

Moreover, Petitioners now raise new issues which were never presented to nor ruled on by the jury, the District Court or the Second Circuit. Petitioners complain that, "the Second Circuit purported to apply the same disparate impact analysis the Supreme Court articulated in *Griggs*." (Petition for a Writ of Certiorari, pg. 10). However, during the proceedings before the District Court, Petitioners specifically requested jury instructions setting forth the precise burden shifting analysis articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as interpreted by the Second Circuit in *Smith, Wado, et al. v.*

Xerox Corporation, 196 F.3d 358, 364-368 (2d Cir. 1999). (*See*, Appendix "A"). During the charge conference and after the charge was given to the jury, Petitioners failed to object to the instructions regarding the burden shifting analysis articulated in *Smith, Wado*. (*See*, Appendix "B"). In light of the foregoing, Petitioners have waived any argument in this regard. *See*, Fed.R.Civ.P. Rule 51(d); *City of Springfield*, 480 U.S. at 259; *Jarvis*, 283 F.3d at 62.

Petitioners note that the ADEA (29 U.S.C. § 623(f)(1)) provides employers with affirmative defenses involving bona fide occupational qualifications ("BFOQ") and reasonable factors other than age ("RFOA").(Petition for a Writ of Certiorari, pg. 10). Petitioners claim that they "were able to prove at trial that their decisions were based upon reasonable factors other than age." (*Id.* at pg. 13). However, there is no jury verdict, District Court finding, or Second Circuit decision supporting Petitioners' contention in this regard. In its written decision denying the Petitioners' motion for JMOL, the District Court discussed Petitioners' burden of persuasion and the charge to the jury which Petitioners requested and thereafter accepted without objection. *Meacham*, 185 F.Supp.2d at 212-214. Issues regarding the affirmative defenses of BFOQ and/or RFOA were never presented to nor ruled on by the jury, the District Court, or the Second Circuit. Petitioners waived this argument before the District Court. *See*, Fed.R.Civ.P. Rule 51(d). It is incredible that Petitioners are attempting to fundamentally change their trial strategy by raising this issue for the first time before the Supreme Court.

Petitioners argue that this Court should provide guidance to the EEOC, "which has issued regulations purportedly permitting employers to avoid liability only by

establishing an affirmative defense that their decisions are based upon 'business necessity' ". (Petition for a Writ of Certiorari, pg. 11). Once again, no party raised this issue before the District Court and the jury was given no instructions regarding the "business necessity" standard set forth in the EEOC's regulations. (29 C.F.R. § 1625.7(d)). Petitioners waived this argument before the District Court and cannot now raise it for the first time before the Supreme Court. *See*, Fed.R.Civ.P. Rule 51(d).

POINT III

PETITIONERS WAIVED ARGUMENT THAT DISPARATE IMPACT IS UNAVAILABLE UNDER THE NYSHRL

The Petitioner ask this Court to resolve whether the Second Circuit was bound to apply New York State substantive law, as articulated by the State's Appellate Division Third Department, which failed to recognize disparate impact age discrimination under the NYSHRL. It is respectfully submitted that this Court should deny the petition in this regard on the grounds that: (1) both the District Court and the Second Circuit held that Petitioners waived their argument that disparate impact claims are unavailable under the NYSHRL; (2) the Second Circuit was justified in not following the Third Department's decision since that court misinterpreted two prior holdings of the Second Circuit; and, (3) this argument does not present a compelling federal question which is of importance to the public.

In essence, Petitioners argue that the Second Circuit erred when it refused to forgive Petitioners' admitted waiver of their argument that disparate impact is unavailable

under the NYSHRL. *Meacham*, 381 F.3d at 71; *Meacham*, 185 F.Supp.2d at 216-217. Petitioners fail to cite any binding legal authority promulgated by this Court, and/or another federal court of appeals, and/or the New York State Court of Appeals, to support their argument in this regard.

Additionally, the Second Circuit should not be required to apply the Third Department's decision in *Bohlke v. General Electric*, 293 A.D.2d 198 (3d Dep't 2002), to determine whether disparate impact is available under the NYSHRL. The Second Circuit properly questioned the holding in *Bohlke*, which has not been followed by New York's three other Appellate Divisions nor the Court of Appeals. In *Bohlke*, the Third Department relied on the Second Circuit's holding in *Smith, Wado*, 196 F.3d at 363 fn. 1, for the general rule that claims brought under the ADEA and NYSHRL should be analyzed identically. In addition, the Third Department also relied on the Second Circuit's decision in *Criley v. Delta Airlines, Inc.*, 119 F.3d 102 (2d Cir. 1997), (which held that under the ADEA a plaintiff could not create subgroups to do a disparate impact analysis) for its ruling that under the NYSHRL, a plaintiff cannot create subgroups to do a disparate impact analysis. *Meacham*, 381 F.3d at 71. The Second Circuit questioned the Third Department's reasoning in this regard. The Second Circuit found that its general rule requiring ADEA and NYSHRL claims to be analyzed identically should have little application to the subgrouping issue under the NYSHRL since the ADEA protects workers 40 and over and the NYSHRL protects workers 18 and over. *Id.*

This issue does not require the Supreme Court to resolve a conflict between two courts of appeals, or between

a court of appeals and the highest court of a State, or between two state courts of last resort, thus it does not possess any of the reasons that may result in granting a petition seeking a writ of certiorari. Sup.Ct.R. Rule 10.

CONCLUSION

Respondents respectfully request that the Court issue an Order denying the petition for a writ of certiorari and granting any additional relief the Court deems just and proper.

Dated: February 8, 2005

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

(Filed Jan. 25, 2005)

Meacham, et al. v. KAPL, Inc., et al.

Docket Number(s):
02-7378(L); 02-7474(XAP)

Motion for:
Substitution of Party

Set forth below precise, complete statement of relief sought:

The substitution of Margaret P. Reynheer of her late Husband William C. Reynheer pursuant to FRAP Rule 43(a)(1).

MOVING PARTY:
Margaret P. Reynheer

☒ Plaintiff
☐ Appellant/Petitioner

MOVING ATTORNEY:
John B. DuCharme, Esq.

OPPOSING PARTY:
KAPL, Inc., et al.

☐ Defendant
☐ Appellee/Respondent

OPPOSING ATTORNEY:
Margaret A. Clemens, Esq.

[name of attorney, with firm, address, phone number and e-mail]	[name of attorney, with firm, address, phone number and e-mail]
John B. DuCharme, Esq. Berger, DuCharme & Harp, LLP 1023 Route 146 Clifton Park, New York 12065 518-373-1482; bdattys@aol.com	Margaret A. Clemens, Esq. Nixon Peabody, LLP Clinton Square Rochester, New York 14603 585-263-1000; mclemens@nixonpeabody.com

Court-Judge/Agency appealed from: U.S. District Court, N.D.N.Y.; Hon. David R. Homer, U.S. Magistrate Judge

Please check appropriate boxes:

Has **consent** of opposing counsel:

A. Been sought?
☒ Yes ☐ No

B. Been obtained?
☒ Yes ☐ No

Is oral argument requested?
☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☒ Yes ☐ No
If yes, enter date 09/03/03

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTION PENDING APPEAL:

Has request for relief been made below?
☐ Yes ☒ No

Has this relief been previously sought in this Court?
☐ Yes ☒ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

/s/ John B. DuCharme **Date:** January 21, 2005

Has **service been** effected?

☒ Yes ☐ No

[Attach proof of service]

ORDER

IT IS HEREBY ORDERED that the motion to substitute Margaret P. Reynheer for her late Husband, appellee and cross-appellant William C. Reynheer pursuant to FRAP 43(a)(1) is GRANTED.

FOR THE COURT:
ROSEANN B.
MACKECHNIE, CLERK

By:

/s/ Tracy W. Young
Tracy W. Young Motions
Staff Attorney

_____
Date

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CLIFFORD B. MEACHAM; THEDRICK L. EIGHMIE; and ALLEN G. SWEET, individually and on behalf of all other persons similarly situated, Plaintiffs, - against - KNOLLS ATOMIC POWER LABORATORY, Inc., a/k/a KAPL, Inc.; LOCKHEED MARTIN, INC.; and JOHN J. FREEH, individually and as an employee of KAPL and Lockheed Martin, Defendants.	**No. 97-CV-12 (DRH) (Lead Case)**
JAMES R. QUINN, PhD, Plaintiff, - against - KNOLLS ATOMIC POWER LABORATORY, Inc., a/k/a KAPL, Inc.; LOCKHEED MARTIN, INC.; and JOHN J. FREEH, individually and as an employee of KAPL and Lockheed Martin, Defendants.	**No. 97-CV-45 (DRH) (Member Case)**

DEFENDANTS' PROPOSED REQUESTS TO CHARGE

EPSTEIN BECKER & GREEN, P.C.
250 PARK AVENUE NEW YORK, N.Y. 10177-0077

(212) 351-4500
Attorneys for Defendants

* * * *

Requested Instruction No. 18

(Summary of Plaintiffs' Claims)

The plaintiffs have sued the defendants under two different laws against age discrimination as a result of their terminations. The first is the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*; the second is the New York State Human Rights Law ("HRL"), Executive Law of the State of New York §§ 290 *et seq.*

The plaintiffs base their claims of discrimination on two theories: disparate treatment and disparate impact. Under a disparate treatment theory, plaintiffs allege that defendants intentionally discriminated against them because of their ages. Under a disparate impact theory, plaintiffs allege that defendants had an employment practice which is neutral in its face, but actually falls more harshly on older employees and is not justified by business needs.

Defendants deny violating the law under either of these theories.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 985-86 (1988); *Smith v. Xerox Corp.,*

196 F.3d 358, 364-65 (2d Cir. 1999); *District Council 37 v. New York City Dep't of Parks & Recreation,* 113 F.3d 347, 351-52 (2d Cir. 1997); Waisome, 948 F.2d 1370, 1374 (2d Cir. 1991); see Complaint and Answer.

* * *

Requested Instruction No. 21

(Disparate Impact – Defendant's Burden of Production)

If, and only if, the plaintiffs have proven their prima facie case for their claim of disparate impact, the defendants must explain the business justification for the RIF. The issue is whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer. The practice or policy need not be " 'essential' or 'indispensable' " to the employer's business for it to pass muster.

Wards Cove Packing Company, Inc., et al., v. Atonio, 490 U.S. 642, 659 (1989); *EEOC V. Joint Apprenticeship Comm.,* 186 F.3d 110, 120 (2d Cir. 1999); *Waisome,* 948 F.2d at 1375.

Requested Instruction No. 22

(Disparate Impact – Plaintiffs' Ultimate Burden)

Once defendants have demonstrated the business justification of the RIF, plaintiffs can prevail only if the [sic] prove that KAPL's explanation is a pretext for discrimination. To satisfy this burden, plaintiffs must prove that another option without a similarly undesirable age effect would also serve KAPL's legitimate interests. Any alternatives, however, must be equally effective as KAPL's chosen procedure, the RIF, in achieving KAPL's legitimate

employment goals. Other burdens of any proposed alternatives are relevant when deciding whether or not plaintiffs' alternatives are equally effective as KAPL's chosen method in achieving KAPL's legitimate business goal.

Wards Cove, 490 U.S. at 660; *Watson,* 487 U.S. at 998; *District Council 37,* 113 F.3d at 352; *Waisome,* 948 F.2d at 1375.

* * *

Requested Instruction No. 36

(Disparate Impact – Plaintiffs' Burden of Proof – Prima Facie)

Plaintiffs also claim the defendants' actions had a disparate impact on workers over forty. To establish a prima facie case of disparate impact, the plaintiffs must prove by a preponderance of the evidence that (1) a facially neutral policy or practice of the defendants resulted in significantly discriminatory adverse impact on workers over forty, and (2) the policy or practice caused the discharge of plaintiffs because of their age.

If you decide that the plaintiffs have failed to prove a prima facie case of a disparate impact, then you must decide in favor of the defendants.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988); *Smith v. Xerox Corp.,* 196 F.3d 358, 364-65 (2d Cir. 1999); *District Counsel 37, AFSCME v. New York City Dep't of Parks and Recreation,* 113 F.3d 347, 351-52 (2d Cir. 1997); *Waisome v. Port Auth.,* 948 F.2d 1370, 1374-75 (2d Cir. 1991); *Lowe v. Commack Union Free Sch. Dist.,* 886 F.2d 1364, 1369-70 (2d Cir. 1989).

* * *

Requested Instruction No. 38

(Plaintiffs' Burden of Proof – Disparate Impact)

In order to prevail on their claim that the defendants' decision-making process has disparately impacted on members of the plaintiffs' class because of their age, plaintiffs must prove by a preponderance of the evidence that defendants' reason for the RIF is a pretext for discrimination. To do this, plaintiffs must prove that there are other employment practices that would achieve the employer's legitimate business interests without causing a disparate impact on the older employees.

Wards Cove, 490 U.S. 642, 660-61 (1989); *Watson,* 487 U.S. at 998; *Smith v. Xerox Corp.,* 196 F.3d 358, 365 (2d Cir. 1999); *District Council 37 v. New York City Dep't Parks & Recreation,* 113 F.3d 347, 351-52 (2d Cir. 1997); *Waisome v. Port Authority of New York and New Jersey,* 948 F.2d 1370, 1375 (2d Cir. 1991).

* * *

Dated: June 12, 2000
New York, New York

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

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APPENDIX C

02-7378(L), 02-7474(XAP)

United States Court of Appeals

For the

Second Circuit

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE and ALLEN G. SWEET, Individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, PAUL M. GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PARENE, WILLIAM C. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND and CARL T. WOODMAN,

Consolidated Plaintiffs-Appellees

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

EXHIBIT TRIAL TRANSCRIPT VOLUME VI

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* * *

[4731] The second theory is the disparate impact theory. Under the disparate impact theory, the 26 plaintiffs who held exempt positions at Knolls Atomic allege that the practices by which they were selected for termination of their employment in the Reduction in Force, while fair on their face, were discriminatory in operation. The two nonexempt plaintiffs, Ronald Butler, Sr., and Janice [4732] Polsinelle, do not assert claims under this theory and you may not consider either of them under this theory.

Moreover, this theory applies equally to all 26 exempt employees. Therefore, you must consider the plaintiffs' claims under this theory as to the class or group of 26 exempt plaintiffs and not individually as to each plaintiff.

Under this theory, the 26 exempt plaintiffs allege that the method by which the defendants selected the plaintiffs, although nondiscriminatory on its face, had an adversse impact on the plaintiffs as employees who were 40 years of age or older. Unlike the disparate treatment theory, the disparate impact theory does not require that a defendant intended to discriminate against them on the basis of their ages to establish the claim. It is sufficient if the plaintiffs establish by a preponderance of the evidence that they experienced an adverse impact different from

similarly situated co-workers because of the ages of the plaintiffs, whether or not the defendant you are considering intended that such a result occur.

Your determination of the plaintiffs' disparate impact theory involves three steps. First, you must determine whether the plaintiffs have offered evidence that a specific employment practice of the defendants, although neutral on its face, had an adverse impact on the [4733] plaintiffs as employees 40 years of age or older.

The plaintiffs must demonstrate by statistical evidence that the specific employment practice caused the plaintiffs to be selected for termination of their employment in the Reduction in Force because of their ages. In considering the statistical evidence, you must first determine the group or groups to which the plaintiffs reasonably should be compared. You must then consider the statistical – statistics comparing the groups. There is no minimum statistical threshold requiring a finding that the plaintiffs have demonstrated a disparate impact.

However, you may, but are not required to, consider that a finding of two standard deviations is significant. This means that there is about one chance in 20, or 5 percent, that the explanation for a deviation could be random. Such a deviation must be accounted for by some factor other than chance. In general, the higher the standard deviations found by you, the higher the probability of discrimination.

You must know, however, that I describe these considerations for you as, quote, probabilities, unquote, not, quote, certainties, unquote, that any statistical deviations you find resulted from the ages of the plaintiffs. The defendants assert that factors other than the ages of the

plaintiffs may account for any statistical [4734] deviations. These factors include, but are not limited to, the education, work performance, skills, flexibility and criticality of the plaintiffs as compared to other similarly situated employees.

The plaintiffs assert that some of these factors offered by the defendants were themselves influenced by the ages of the plaintiffs. Therefore, in determining whether the plaintiffs have met their burden of demonstrating this step of their claim, you must determine whether any statistical deviations you find have been proven – whether any statistical deviations you find have been proven were caused by the ages of the plaintiffs, or, on the other hand, by some other factors unrelated to the plaintiffs' ages.

If you find that the plaintiffs have met this initial burden, a presumption of discrimination arises and you must proceed to consider the second step discussed below. If you find that the plaintiffs have failed to meet this burden, you should find in favor of the defendants on the plaintiffs' disparate impact theory.

The second step requires you to determine whether the defendants are rebutted the presumption of discrimination arising under the first step of this theory. Under this step, the defendants must articulate, but not prove, a business justification for selecting the plaintiffs [4735] for termination of their employment in the Reduction in Force. This is not a burden of proof on the defendants and does not require the defendants to prove by any standard that the reason offered was the only reason for their decision to terminate the employment of the plaintiffs. Rather, the defendants have satisfied their burden in this step if you find that the defendants have presented a business justification for the selection of the plaintiffs for

termination of their employment in the Reduction in Force. You need not find, nor need the defendants prove, that such justification was essential or indispensable to the defendants' business. If you find that the defendants have met this minimal burden, the presumption of discrimination arising under the first step is rebutted and plays no further part in your deliberations.

If you find that the defendants have satisfied their burden in the second step, you must then determine whether the plaintiffs have established by a preponderance of the evidence that the reason offered by the defendants is a pretext or cover for discrimination. In this regard, the plaintiffs must prove on the basis of all the evidence presented that an alternative method would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants.

[4736] If you find that the plaintiffs have satisfied their ultimate burden in this third step, then you should find in favor of the plaintiffs on the disparate impact theory. If you find that the plaintiffs have failed to meet this ultimate burden, then you should find in favor of the defendants on the disparate impact theory.

* * *

[4741] in the past, each day at 9 o'clock, and we will not proceed past 5 o'clock. The jury has the right and the privilege to extend those hours if you wish, but not to reduce them.

* * *

Any objections to the charge as given other than previously noted, plaintiffs?

MR. DuCHARME: No, your Honor.

THE COURT: Defendants?

MR. HIGGINS: No objection.

THE COURT: Thank you. Please swear the marshal.

(Marshal duly sworn.)

THE CLERK: Court stands in recess.

* * *

(2)
FILED
FEB 17 2005
OFFICE OF THE CLERK

No. 04-955

IN THE

Supreme Court of the United States

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Petitioners,

v.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET P. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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LIST OF THE PARTIES TO THIS PROCEEDING

When the petition was filed, William C. Reynheer was not listed as an interested party because he was deceased, and no motion had been made to substitute his estate or his wife as a party. In light of the new information provided by respondents in connection with their subsequent motion to substitute Mr. Reynheer's wife as a party, and in light of the January 25, 2005 Order issued by the Second Circuit Court of Appeals, petitioners agree that Margaret P. Reynheer should now be added as an interested party to this proceeding on behalf of her deceased husband, William C. Reynheer.

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Petitioners respectfully submit this reply to respondents' brief in opposition to the petition for a writ of certiorari.

REPLY TO COUNTERSTATEMENT OF THE CASE

Petitioners disagree with respondents' claims that petitioners have made misstatements or false assertions to this Court. The statement of the case and other statements of fact made in the petition are fully supported by the record, including the testimony of witnesses and other evidence submitted at trial. Petitioners, however, will not refute each and every allegation made by respondents at this stage as they believe that it is beyond the purview of a reply.

Notably, however, respondents continue to focus, as they did at trial, on allegations that are more consistent with their disparate treatment age discrimination claims than with their claims of disparate impact. The Second Circuit, too, apparently equated disparate impact with disparate treatment in finding that a suitable alternative to the reduction in force ("RIF") would have been to have more safeguards against subjectivity and "managerial bias." (Petition 32a). This suggested alternative, never proven at trial, focuses on eliminating intentional discrimination. It is undisputed, however, that the jury's verdict completely exonerated petitioners from any claims of intentional age discrimination.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE OF THE VIABILITY OF A DISPARATE IMPACT CLAIM IS PROPERLY PRESENTED FOR THIS COURT'S REVIEW BECAUSE, AMONG OTHER REASONS, IT WAS PASSED UPON BY THE COURTS BELOW

As discussed in detail in the petition for certiorari, this proceeding involves a legal question of exceptional importance on which the circuit courts of appeals are deeply divided: whether or not a disparate impact claim is available under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. Respondents contend that this Court should deny the petition because petitioners waived this argument by not raising it below, including at trial during the charge conference and that, as a result, respondents were somehow "sandbagged." (Respondents' Brief in Opposition, 11).

This claim should be rejected outright. Under well-established precedent of this Court, which respondents have chosen to ignore, any issue "pressed or passed upon below" by a federal court is subject to this Court's broad discretion over questions it chooses to take on certiorari. *Verizon Communications, Inc. v. Federal Communications Comm'n*, 535 U.S. 467, 530 (2002). *Accord United States v. Williams*, 504 U.S. 36, 41 (1992) (considering the merits of an issue despite party's failure to present it); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (noting that "[i]t suffices for our purposes that the court below passed on the issue presented," particularly where the issue is in a state of evolving definition and uncertainty and is important to the administration of federal law); *Stevens v. Dep't of the Treasury*, 500 U.S. 1, 8 (1991) (holding that the petition for certiorari was properly granted where the legal issue was passed upon by the district court and the court of appeals).

Here, it cannot be genuinely disputed that both the District Court and the Second Circuit passed upon the legal issue of whether or not a disparate impact claim is viable under the ADEA. The District Court passed upon this issue when it denied petitioners' Rule 50 motion for judgment as a matter of law seeking the dismissal of respondents' disparate impact claims. In denying that motion, the District Court reasoned that although other circuit courts of appeal are divided on this issue, the disparate impact theory is still available under the ADEA in the Second Circuit. (Petition 56a). Recognizing that the District Court had passed upon the issue, the Second Circuit also passed upon it and expressly upheld its prior holdings that the "ADEA allows disparate impact claims." (Petition 21a). Thus, this issue is properly presented for review by this Court.

Moreover, although it was not raised at the trial itself, petitioners pressed this issue to both courts below. Petitioners raised this argument on their motion for summary judgment before the District Court. (*See* Petition 20a). Petitioners also pressed this issue before the Second Circuit, specifically requesting that the court reconsider its prior holdings in light of more recent decisions of its sister circuits and other developments in the law. (Petition 3a).

In any event, this question presents a purely legal issue, and there is no proof that respondents would have offered any other proof at trial in support of their disparate impact claims had petitioners raised the viability of such claims at the charge conference. Thus, there is no merit to respondents' claim that they were "sandbagged."

As is evidenced by this Court's granting of the petition to resolve this issue in *Smith v. City of Jackson*, 124 S. Ct. 1724 (2004), the law on this issue is in a state of uncertainty and yet is important to the administration of the ADEA. Given

the number of cases that have examined the issue and the significant split in the circuits, the issue is ripe for a definitive resolution by this Court, a fact which respondents concede in their brief. (Respondents' Brief in Opposition 12). Accordingly, the petition should be granted, at a minimum, to hold it for disposition in accordance with the ultimate decision in *City of Jackson.*

In addition, as discussed in Points II and III of the petition and below, the petition also raises other related and extremely important federal issues that merit the Court's attention.

II. ASSUMING THE AVAILABILITY OF A DISPARATE IMPACT CLAIM, COMPELLING REASONS EXIST FOR SETTLING THE STANDARDS TO BE APPLIED IN RESOLVING SUCH A CLAIM

Even if this Court determines that a disparate impact claim is viable under the ADEA, this case presents a unique and perfect opportunity for the Court to settle exactly what a plaintiff's burden of proof is at trial concerning a disparate impact ADEA claim.

Respondents claim that the petition should not be granted on this issue because petitioners have not demonstrated a conflict in the circuits in determining what a plaintiff's burden of proof is on an ADEA adverse impact claim. They urge the Court to permit the courts of appeals to express their own opinions on this issue first. For the reasons cited below and in the petition, however, there are compelling reasons for this Court to settle this issue now. (Petition 10-17).

While there is no existing conflict yet as to the standards of proof on a disparate impact ADEA claim, in their discussion of the availability of a disparate impact claim under the ADEA, the circuit courts are already sharply divided

as to how to interpret the ADEA's provisions in light of the exception to the statute's general prohibitions against age discrimination for actions taken based upon "reasonable factors other than age." 29 U.S.C. § 623(f)(1). A majority of circuits have held that this exception precludes a disparate impact claim altogether, while others, including the Second Circuit, have concluded otherwise. (Petition 6-9).

As pointed out in the petition, as well as by the parties in the *City of Jackson* case, the Equal Employment Opportunity Commission takes a different position altogether, having issued regulations that purport to require employers to establish, as an affirmative defense, a business necessity for their decisions. (Petition 11).

The standards or burdens of proof for a disparate impact ADEA claim, should such claim be viable, are inextricably tied to the availability of the claim itself such that the burden of proof issue should also be decided. Indeed, during oral argument in the *City of Jackson* case, this Court asked several questions which were directed at the applicable standards for proving a disparate impact claim, even though that this issue had not been squarely raised, given the ADEA's statutory exception for actions that are based upon reasonable factors other than age.

Moreover, unlike Title VII claims subject to the Civil Rights Act of 1991, which codified the respective burdens of proof and persuasion for disparate impact claims under that statute, 42 U.S.C. § 2000e-2(k), the ADEA is devoid of any standards for the courts to apply. (*See* Petition 8). As a result, the statute itself provides no guidance to the courts on this issue. Thus, in light of the above conflicting interpretations of the statute and lack of guidance from Congress, the issue of the proper standards to be applied on an ADEA disparate impact claim is now ripe for resolution by this Court.

In any event, petitioners do not have to demonstrate that a conflict exists on this precise issue for this Court to grant the petition. (*See* Sup. Ct. R. 10). To the extent that this Court decides to apply the same standards as it has applied in disparate impact cases under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., the Second Circuit has so departed from that standard, and from the accepted and usual course of judicial proceedings, that this Court should exercise its supervisory powers and grant this petition.

It is undisputed that both the District Court and the Second Circuit found that petitioners met their burden of offering proof that they had "facially legitimate business reasons for the IRIF and its constituent parts." (Petition 30a). At that point, under the burden of proof analysis in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), respondents were required to prove that there were equally effective alternatives to the specific employment practices being challenged.

At trial, respondents relied upon two alternatives, which were actually alternatives to the RIF itself, which the Second Circuit correctly found were not sufficient to satisfy respondents' burden of proof at trial. (Petition 31a). In direct conflict with this Court's decisions in *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Second Circuit then suggested that petitioners should have used criteria that were not as subjective as flexibility and criticality of skills and, thus, were less subject to managerial bias. (Petition 32a). The Second Circuit affirmed the judgment of liability without identifying specifically what those criteria were, let alone finding proof that such unspecified criteria would have resulted in employees under the age of forty being selected for the RIF instead of older employees. (*Id.*).

In doing so, the Second Circuit materially deviated from the standards for proving a disparate impact claim, as articulated by this Court in Title VII cases. Moreover, the Second Circuit usurped the jury's function to weigh the evidence presented and nullified its verdict with regard to the disparate treatment claim. This deviation from the accepted and usual course of proceedings should be reviewed by this Court. As a practical matter, if these issues are not resolved by this Court, or if the Second Circuit's decision is permitted to stand, employers are likely to resort to giving preferential treatment to older workers, or worse, imposing quotas. Respondents have simply ignored these compelling reasons for granting the petition.

In any event, to the extent that petitioners' arguments concerning the standards of proof to be applied in resolving a disparate impact claim include new arguments not raised below, it cannot be disputed that this Court has the broad discretion to consider such new arguments because this area of law is evolving and uncertain. *See Virginia Bankshares*, 501 U.S. at 1099 n.8; *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001).

III. THE SECOND CIRCUIT'S REFUSAL TO APPLY INTERMEDIATE STATE COURT DECISIONS WAS PLAIN ERROR AND INVALIDATED STATE LAW

Petitioners urge this Court to review the Second Circuit's decision with regard to respondents' state law age discrimination claim because the decision below conflicts with relevant and important decisions of this Court on how and when to apply state law. *See West v. AT&T*, 311 U.S. 223, 236-237 (1940), and cases cited in Petition 17-20.

Respondents disagree, claiming that the state law claim does not present a compelling federal question. This is simply

not the case. Indeed, while this Court does not ordinarily grant certiorari to review questions of state law decided by the federal courts, the Court has done so where the lower courts have committed plain error. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

As this Court has reasoned in other cases, a petition for certiorari to review a judgment of a federal court of appeals undoubtedly should be granted where the lower court's interpretation of state law was plainly wrong and had the effect of totally invalidating state law. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (per curiam). That is precisely the case here. The Second Circuit committed plain error in refusing to consider and apply new developments in New York state law, as articulated by the intermediate appellate court in the very same judicial department where this case was tried (the Appellate Division of the New York Supreme Court for the Third Department).

This Court should reject respondents' contention that the Second Circuit was justified in ignoring these decisions because the intermediate appellate court interpretations of the state anti-discrimination law were wrongly decided. The Second Circuit had an obligation to determine and apply the content of New York law even if it thought that the rule articulated by the New York intermediate appellate court was unsound or that another rule was preferable. This is true even if the rule had not yet received the sanction of the highest state court. *West*, 311 U.S. at 236 ("[A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

Similarly, respondents' claim that the Second Circuit was justified in failing to address the state law claim on grounds of waiver ignores the fact that this was a new development in state law, decided only after the trial in this case. As the

Supreme Court recognized in *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941), however, the duty of the federal court is to mirror state law as it exists at the time its decision is rendered.

The effect of the Second Circuit's plain error in refusing to follow the precedent of this Court is to invalidate totally New York law, as interpreted by an intermediate appellate court, and to permit a judgment of liability to stand where no such cause of action even exists under state law.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

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